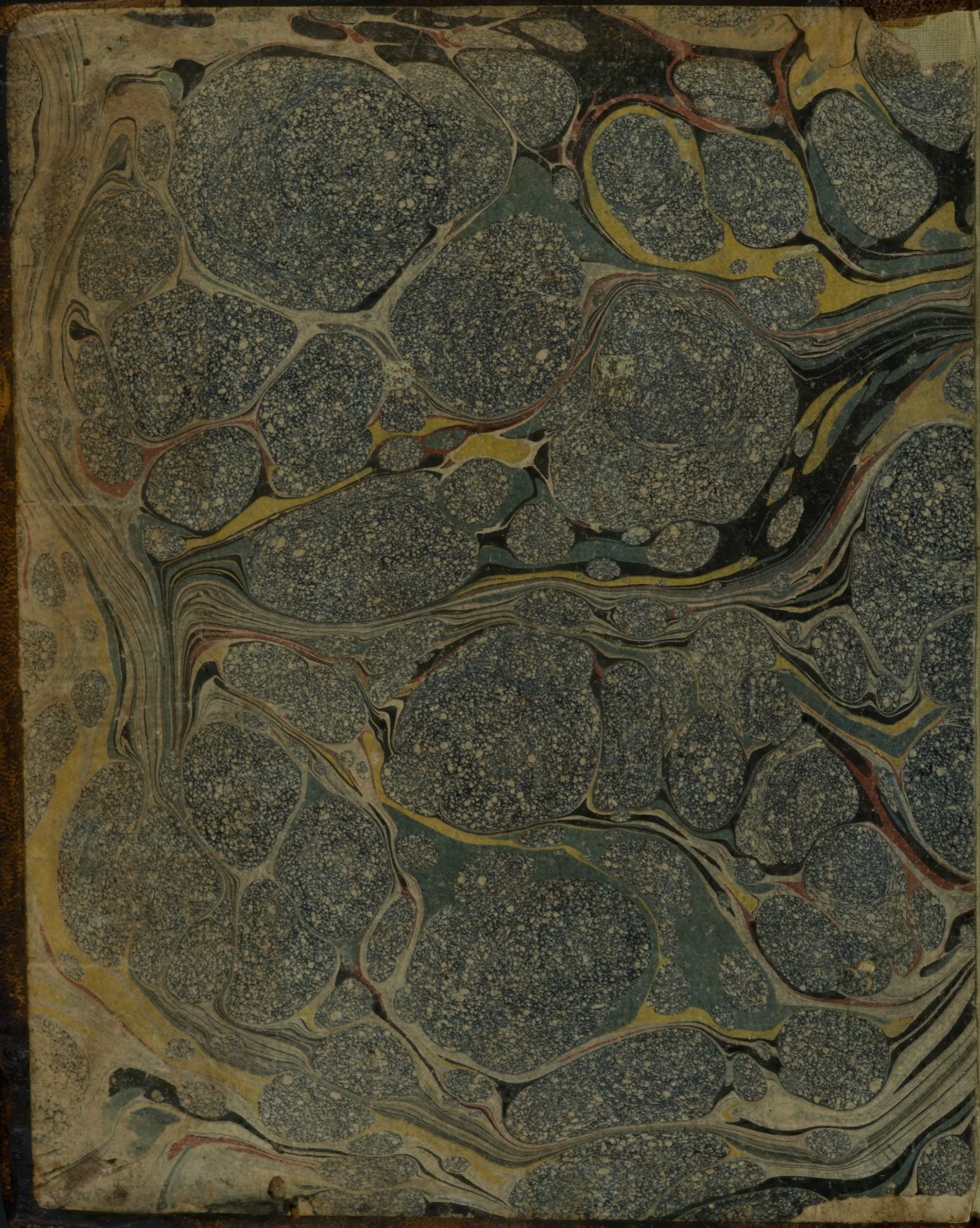

A B Reave

7

VIIa

Private Wrongs--

Private Wrongs.

The subjects of Torts are either the persons or property of those who suffer.—

The tort may also have been committed on both. If the tort be done to the property of the injured person, his real or personal property may be the subject or both.

In every case of a tort the injured person has a remedy, unless it be accompanied with a felony. If so it is doubtful whether there can be a remedy, the injury being merged as in the Eng. law.

In some cases of tort there arise two actions; one in favour of the party injured, and one in favor of the public — And as the rights of the public are altogether paramount to the private right, the wrong done to the individual is merged tort or swallowed up in the public offence, if that offence amounts to a felony.

It is a true position that the right of the public is always paramount to the private right: And as in cases of felony the public by the old fa com. law always had a right to the person or life of the wrongdoer, and also to all his property, it followed that nothing was left for the sufferer.

But as there are now in the U. States but few cases of felony where the life of the wrongdoer is taken and fewer still where all his property is taken, it is submitted whether the sufferer

ought not in every case to have relief, when either the person or the whole of the property is not taken, the Eng. books and the doctrine of merger not withstanding?

As the doctrine of merger resulted from the peculiar requirements of the law i.e. of the person of the wrongdoer that it might be cut out for an example, and of all the property that the public might be remunerated for the breach of its laws as far as might be; and as the law in America does not require these things but is changed, the rules of law which resulted from this peculiar state of things ought or at least seem to be changed also. For when as in this case the reasons of the rule have ceased it is the height of weakness & folly not to change the law also.

Indeed in Eng. if ~~some of the property~~ from the amelioration of punishments, either the life or some of the property of the offender be spared, Mr Reeve considers that they ought upon the genuine principles of the com. law to be made subject to the demands of the injured person.

No suit however, it is true could be brought against the representatives of a person who was hanged for the commission of the offence: but this rule depends not upon the principles of merger but upon the idea that no man's [illegible] shall be mulct for the wrongs of the testator or deceased.

In running the subject of torts we must of course ad-

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-vent to the several actions arising ex delicto, of which some arise from simple tort, disconnected from the idea of any force or violence - Some arise from torts connected with the idea of actual violence and force used.

From the first division arise the several kinds of actions of TRESPASS ON THE CASE. This is an action arising ex delicto simply from tort or wrong where no breach of any contract is suggested and no forcible violence imputed to the Deft.

This negative discription, is the only one which can be easily given of this action; for it would be impossible to recount all the various occasions of bringing these anomalous suits. They may be brought for injuries effecting the pltfs person, or his reputation, safety, health and other business. Or they may be brought for injuries respecting his property; or of some incorporeal right or some reversionary or expectant interest - It may be brought also for deceit or fraud, as in sales, &c improper negligence from which damage magnent thereof - conversion &c &c.

TRESPASS VI ET ARMIS & REPLEVIN which lie for torts accompained with force real or implied. As for Assault, Battery, False imprisonment &c Property wrongfully taken &c &c -

A General view of Slander -

Malice & Falsity are the essential ingredients ~~which~~ of

such injuries to the reputation of one, as the injured person may recover damages for: and if neither of these exist the Plft: must fail in his action.

To speak a truth therefore of one, altho' it be said with malice and with a design to injure, will not entitle to a recovery

So also to utter an untruth without malice, will not support an action — This will necessarily lead to some inquiry into the legal effect of the word <u>malice</u>. This term does not convey exactly the same idea in law as in common parlance. The extent of the term is better understood by the Latin word <u>malitia</u> as used in the Books; it means any improper motive, or wanton disregard to our fellow mortals, which may actuate a man in a particular transaction, ~~two~~ and is not confined to any special ill will or spirit of revenge against an individual.

When a man coolly relates any slanderous report of another not having any substantial reason for it, the law will presume him to have been actuated by <u>malice</u>, and this, altho' he really believed the story which he propogated. For it was at least idle and unnecessary to repeat the story, and having told it and of course wounded the reputation of one he should make retribution, unless he can prove the story to be true.

However if there be an evil report about a man which is accompanied with such circumstances as to cause it to be ~~under~~

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generally credited, and one man tell it to an other, he will merely be presumed to have been actuated by malice, and this presumption he may by the attending circumstances rebut.

Recovery in slander may be had in two classes of cases; viz. when the words spoken are actionable in themselves, and where the words spoken are not actionable in themselves, but being attended with special damages to the person to whom they were spoken, are sufficient, if the special damages be proved to support the action, and in the latter case the special damages must be stated in the declaration.

Words actionable in themselves are divisible into 4, classes, viz. I where by them one charges an other with the commission of a fact punishable by the law more severely than barely by fine, then are the words actionable in themselves; and tho' the Pltf. cannot prove any special damage whatever, and state none; yet he shall recover; for it will be presumed that he either has or may suffer damage.

For altho' the facts charged, if true, may subject the party accused to punishment, but to none of a higher degree than fine; yet the words as a general rule are not actionable of themselves.

But there is a middle class, wherein the words are or are not actionable according to circumstances.

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As it respects this class of cases the books and decisions are quite confused. — But from a collection of the several decisions Mr. Reeve thinks that the following rule may result. Viz. if the charge be a crime, which according to the general idea of people effects the reputation of the person charged, it being a charge also which if true, would subject him to a fine, then the words shall be considered actionable in themselves — If the charge do not if true, subject the party to punishment by fine, the words are not actionable of themselves — Or tho' the charge subject to a fine, yet if it be not such a charge as according to the prevailing notions of mankind, had a tendency to injure the reputation of the man, the words are not actionable of themselves — There is a law of the city of New Haven, that if any one throw out ballast from his vessel into the harbor, he shall be fined &c If a sea capt. be accused of it, yet tho' it were true the charge would subject him to a fine, it would not however according to the common notions of people injure his reputation materially; such words therefore are not actionable.

This class of cases may however be included under the first ~~division~~ division —

II. The ~~class~~ second ~~class of cases~~ general class of cases of words ~~are~~ actionable in themselves, are such as are calculated to injure a man in his trade or profession.

× So "he is no more a lawyer than the Devil" 3 Wils. 59. Sid. 327. So "he will overthrow his clients cause" Cr. E. 589 So "he cannot raise a declaration" 1 Sev. 297.

Where one confidentially and by way of friendly warning to an other said of a trader "He will be a bankrupt soon" Held not actionable tho special damage was laid and proved Esp. D. 503. 3 T.R. 60.1. B.R. P. 8.

So if the words were spoken between members of the same church in the course of their religious discipline & without malice no action lies. Jarvis vs Hatheway. 3 John. 180.

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But the words must be such as would go immediately to effect him in his trade; for every stain upon a man's moral character is calculated in a degree to effect him in his trade tho' perhaps remotely or in a circuitous manner.

Thus to say of a merchant that he is a bankrupt, has a tendency directly to effect him in his trade — To charge a physician with want of skill in his profession is actionable for a similar reason. To say the same of a lawyer, or any other agent, or attorney, is actionable. To say of a clergyman that he was a heretic, is according to the old books actionable &c. In lon. to call a clergyman liar has been holden actionable.

III. Those words are actionable in themselves, which charge a man in office with principles inconsistent with it or with inability to perform its duties — whether the office be one of dignity trust or of profit. Under this class, that species of scandal called scandalum magnatum is by the Eng. books included. Of this we know nothing in Con.

To say of a man holding an office that he is not fit for it, in a colloquium respecting his office, or him as an officer, is actionable. To say of a Justice of the peace in a colloquium respecting his office, that he is "a Jack ass of a Justice" or "a block head Justice" &c is actionable. But in such case it must be averred in the declaration, that the words were spoken.

respecting his official acts or activity; and must be so proved or the Pltf. will fail -

Under this class, a distinction has been taken between offices merely ordinary, and those which are lucrative. The distinction Mr Reeve supposes not to be founded in principle.

IV. The last class of words upon which a recovery may be had, ~~are~~ without proving damages, are those which may operate to exclude a man from society, as to say of J. S. that he has the leprosy, or the venereal ~~disease~~ disease. and an action was brought in Com. against a man for saying of the Pltf. that he had the itch, but the suit did not receive a legal determination.

In these cases of words actionable in themselves, the Pltf. need not, state to entitle himself to a recovery state any special damages - But if special damages have accrued, it is well to state them, in order to increase damages - for unless they be stated in the declaration, the Pltf. cannot go into the proof of them -

Words actionable in themselves, may be, and frequently are coupled with other words, which shew that the Deft. did not speak them in their ~~use~~ legal sense. To say of a man that he is a thief is actionable: but in order to shew in what sense they were spoken, or ment. to be taken, the whole

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of the conversation must be taken together; from which it appears that the Deft. did not understand his expression in the legal sense, for his words were, P. S. is a thief because he stole my trees; now as felony is not predicable of trees, the words appear not actionable. So, when Sally Sliler sued Tom Noker in slander for calling her a thief, it appeared on trial that he called Sally a thief because she had stolen his heart; poor fellow! The pltff. failed in her action —

But the fact need not be stated in express terms; provided the idea be unequivocally conveyed, it will suffice. As if the Deft say "the birds told me that P. S. stole it"; or as if in a significant manner the Deft. ask the witness if he had heard that P. S. stole it, — Or as if the Deft. set the witness to guess who stole, and P. S's name being mentioned, he tells the witness significantly & that he need not guess again. For to convey the idea by words would seem sufficient.

But it would seem that words were absolutely necessary to constitute the offence of parol slander; since when a man found out a ~~thethod~~ method without speaking of convincing all his neighbours that P. S. stole his the Deft's word & a suit in slander was brought, the Pltff. failed. This was a Com. decision, and Mr Reeve thinks an erroneous one — And on this principle it would seem that a dumb man could not be guilty of parol slander.

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The words spoken, must importe some degree of guilt; therefore to say of a man that he would steal, or is inclined to steal he is not actionable, for there are not charges of the commission of any ~~ground~~ fact, but merely an inclination which is not in law actionable. However words spoken adjectively, may be actionable; as if the Deft. say "I left my saddle here at dusk last night, J. S. passed by soon after, and this morning my saddle was gone — and you knowest J. S. is a thievish dog" these words taken in their connection are actionable — as they were holden to be actionable —

Words not actionable in themselves, by averment & proof of special damage will support an action —

For if such words do not, except by distant implication, affect the ~~character~~ moral character of the man, and he can prove special damage he shall recover. To call a merchant a bankrupt, is actionable; but to call an individual not a merchant a bankrupt, which merely but distantly affects the moral character of the man, will be a ground of recovery, provided special damage be proved. But in all such cases the special damage must be averred in the declaration, for it is the gist of the action —

A review of the preceding remarks with the authorities cited.

The authorities on the subject of slander are more numerous than on any other title in the law.

Words charging a woman with adultery not actionable in themselves. Buys & Wife vs Gallespie & Johnson R. 115 –

No action will lie for charging a man with being the father of an illegitimate child unless it be averred that the child has become chargable to the parishe. Cr. C. 436. Satter vs Brown. 6 Bac 210. Sab 694.

Cro. J. 114. 205 –

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At one period of time the governing principles have been wholly repugnant to those which governed at an other — At one period it had become a maxim, that all words should be taken in severe sense. This was a very easy rule of construction, whereby words were tortured to convey some wrong meanings, that the party might be suspected — At an other period, the rule of construction was that the words should be taken in meliori sense. The consequences resulting from this were most pernicious —

But the modern rule is, that the words connected with the circumstances, shall be taken in such a sense, as that, in which they would be most usually understood by people in general, and those who heard them — And the intention of the speaker is a governing rule: and the question whether the speaker intended to fix the charge upon the Pltff. is the most material one —

This last rule without doubt is by far the most rational one, and is perfectly well calculated to do complete justice.

The law having been so often varied, it is easy to conceive that the authorities must be as they are, irreconcilable.

Restricted as in the foregoing remarks, it may now be laid down as a rule, that words charging the pltff. with such a crime as is punishable, are actionable. The rule laid down in the books is, that such merely are actionable, as if true would

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subject the pltff. to corporal punishment.

The rule as restricted would stand thus — words which if true, would subject a man to corporal punishment, and words which if true, would subject a man to a fine, being such words as according to the common mode of thinking, would derogate from, or impeach his morality — are actionable.

As it respects this first class of ~~cases~~ words, namely, such as would support an action without proof of special damage, it may be remarked again that the charge which the plaintiff ment to lie upon the pltff. must be of a thing which is a certain and definite crime. Thus to call a man a rascal, is not actionable without a *per quod*, the pltff. received damage &c. because the charge is not of any definite ~~thing~~ crime B.

[But where is the difference between calling a man a bankrupt, and calling him any other thing which imports no turpitude in the person slandered? Relative to this part of the subject, there has been much contention. We have apprehends the rule to be that where a man unnecessarily, wantonly i.e. maliciously says of, and thus by which, to imply either a deficiency in some degree of integrity or honesty or of morality or an inability in any degree to pay his debts, or to fulfill his contracts &c whereby the person slandered suffers any particular damage, (if the words be not actionable in themselves) then if untrue the words will maintain

1 Roll 34. incor –
Ro. 29. 2 Mod. 189.

2 Ro. J. 114. 206.

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=tain an action — As in the case here put of a bankrupt for granting that there was no implication of want of integrity in the term, used or the expression implied an inability to pay, but detter it comes within the rule —]

B. Hence to say of one that he is a liar, is not of itself actionable or that he is a corrupt man &c. On the ground that the law did not recognize adultry, or fornication as crimes, to charge one therefore of the commission of either, was not action=able — Altho' the spiritual courts punish the parties for by punishment is meant, temporal punishment. But there is a custom of the city of London that common prostitutes shall be carted round the city. In London therefore to call a woman a prostitute is of itself actionable —

So also it is in Con. — For it is a rule of the com. law, that any class of words which were of themselves actionable on the ground of the commission of the fact being punishable, are no longer action=able when the fact is no longer considered as a crime, by the law.

——— This rule e converso is true, therefore since Adultry in Con. is punishable, it follows that a malicious and false charge of it is actionable.

It has been remarked that when one accuses another of a slanderous thing, his whole conversation, and the temper of ~~mind~~ his mind at the time must be resorted to — for there may

Eno. 8. p. 278. —
1 Cent. 28 —

1 Roll. 5th. —

1 Roll. 61. —

1 Roll. 61 —

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so restricted the particular observation used upon or that it will no longer import to be the charge of such a crime as is punishable.

2d Div. Such words as have a tendency in a direct manner to affect a man in his trade are actionable, in themselves. Thus to say of a lawyer "he is a knave" is actionable, for it will prevent clients from trusting him with their pecuniary concerns, which will be to take from the lawyer his means of livelihood — "he'll with your purse for you" meaning to convey the idea that he charged extravagant fees — and such an impression likewise connected likewise with an illusion to a want of honesty, perhaps, goes directly to take away his business — To say also of a lawyer that he is a "quack lawyer" which plainly implies implies that he did not understand his business very well, has been holden to be actionable, altho' a previous decision had determined it not to be actionable — To say of a physician that "he is a quack" has been holden actionable — To say of a Clergyman that he preaches heretical doctrines, has been holden actionable in Massachusetts. But a difficulty arose (for the Deft. justified by stating it to be true) and to ascertain what heresy was. In this case Mr. Rowe recommended to the court that a convention of clergymen be called of the same sect in religion with the parish in which the ~~Deft.~~ Plaintiff was settled, and of the same to which the ~~defendant~~ Plaintiff pretended to belong, and he requested to form and

1 Roll. 58. 150
~~Ro~~ 342. 1 Roll 56.

1 Roll 50 —

Salk. 593 —

determine whether the doctrines ~~whether the doctrines~~ preached by the ~~Deft~~ Plff. were consistent with the principles professed by the sect, and of course whether they are heretical. This method was pursued — and the doctrine found to be orthodox. This being accomplished the case was determined in favor of the Plff.

3dly. This class of cases has been sufficiently treated of perhaps. It may be added that a charge of corruption or want of integrity is not according to the general rule actionable — but when spoken of a man in office, in a colloquium respecting ~~him~~ his office, or him as an officer, they are so — But the words must directly apply to him as an officer, as that "he is a perjured or corrupted judge" — or it must appear from the conversation that the words were applied to him in his official capacity — Thus in speaking of J. S. ~~as a judge~~ who was a judge, I said he was a blood sucker — but as this did not appear to refer to him as a judge (which might infer, if it did that he was a cruel tyrannical & unjust judge.) it was not holden actionable. For it ~~referred~~ applied to him only as a humorous man. —

A distinction has been taken in a case in Salk. that when the words are used to a person in an office of profit, and when in one of credit only — Ex. gr. In officer of profit words which impute either want of understanding of ability or integrity, are actionable. — But in those of credit, words which impute want of ability only are not actionable; as to say of a Justice of the peace "he is an ass"

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"or is a little headed justice" is not actionable - and the reason given was that a man cannot help his want of ability, as he may his want of honesty, and that these words import no corruption or dishonesty. But Mr Reeve does not think that this distinction would at present obtain - The case in Salk. ought to have been decided as it was, but not because of the preceding distinction - The words used did not seem to lay the case to have been applied to the Pltff. in his official situation, it is true the word "Justice" was mentioned as descriptio personae - To say of a Justice "I never got any justice from him, but nothing but injustice" was holden actionable; and yet according to the above distinction, it probably would not be so considered -

4th. This last class of words actionable in themselves, are such as tend to exclude a man from society, or charging him with an infectious disease as the Leprosy, Pox &c

But as to this class the construction is somewhat strict for the words must be in the present tense, and import that the Pltff. had the disorder at the time of speaking the words. However if the Deft had used the past tense merely as a cloak to avoid the law, Mr Reeve says it would not avail him.

It is on all hands agreed that passion will not justify a slanderous assertion -

A proposition is to be found in the books that ~~of pas-~~

heat of passion may be given in evidence, and will ~~mitigate damages~~ go in mitigation of damages — Such matter may or may not go in mitigation, if the Deft. himself begin the dispute, or is in the wrong, and without much provocation wrought it himself up into a passion (then it will rather go in aggravation, than in mitigation of damages. But if on the other hand the Pltff. sight abused the Deft. and provoked him to say some intemperate things, then it will go in mitigation —

The idea has been held up, and generally dwelt upon, in argument, that there can be no great criminality in repeating a story which the Deft. had heard from others; but this is an erroneous idea altogether; Because if a man will wantonly sport with an other's character, to such a degree as to report a vile slanderous story about him, he will show that lawless misanthropic spirit which is the gist of this action Viz. malice.

It has been strongly contended that when A. tells B. that C. told him (i.e. A) that D. was a thief A. might by proving this, protect himself, because it would be proving the truth of his assertions. But this it was decided should be no justification: but might under particular circumstances go in mitigation.

And indeed the circumstances might have been such, as to operate as a full excuse, and rebut the presumption of

Bal. N. Y. B.
2 p

1 Roll 90. 2 Bur.
807. 2 Lo. Je. 90.
1 Roll 80. Palm.
6 B

malice altogether — as if the assertion be accompanied with what appears to be, the convincing proof, that the story was true, in such case there can be no harm in repeating it —

So if the words were spoken out of a motive of friendship, and without an intention to defame — originately perhaps, and in confidence, the action is not sustainable — In where a servant brought an action against her former mistress, for saying to a person to a person who came to enquire her character "that she was saucy and impertinent; and often ran out of her own bed, but that she was a clean girl and did her work well" the Defdt. proved that she was in their means, prevented from getting a place. Yet L.D. Mans. said that malice was the gist of the action for slander — it does not appear here — this was a confidential declaration, and ought not to have been told or disclosed —

If the words were used in the course of legal proceedings, the general rule is, no action will lie — But in such case the words may not be used but as tending to prove some point important in the case — for if, this be not the case, and they be said in that place merely as a shelter from the law, then the speaker shall be liable for slander — the intention then malicious and pattly to lay such a charge to the pltff. would be the leading point.

To charge one of an inclination or aptitude to commit any

Eno. J. 107.—

B. Ch. P. 8—

1 Roll 80—

Co. Eliz. 289-
12 Co. 84—

given crime is not sufficient to sub'not an action —

The charge must not only be a particular defenite crime, committed, but it must also be definitely charged against a particular one. Thus if three persons are present, and J. S. says "one of you stole my horse" neither of the three according to the rule could sue the Slanderer, and there can be no joinder in such a case, and if the crime were a punishable one, against whom could the prosecution be commenced. It yet Mr Reeve apprehended that if by averment it could be made out for whom the charge was meant, such person ought to maintain his suit — as if the Defdt. had hinted such things of the Pltff. before, or as if there had been a personal quarrel &c between them —

For where J. S. told T. N. that his "son or his wife or his brother (and he might guess who) had been guilty of forgery — either of the three may by averment view ~~what was meant~~ that himself was intended.

If two persons — say the same words of another yet a joint action will not lie —

Where the expression is "the Boyes (the name of a family) are thatorn it is not actionable.

If the intention to charge a particular crime upon one, be apparent, it will suffice — as if it be done by way of question "Have you heard that J. S. stole Ds. horse &c. —

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So if the idea be conveyed by way of course tune — or if significantly to say "I quest J. S. stole &c"

So where J. S. says "I know what I am, and I know what S. is, and know that I never stole sheep" this expression was holden actionable because the idea was clearly conveyed that S. was a thief.

So where words are used adjectively — they are actionable —

Of the Pleadings in Slander —

Great strictness formerly prevailed in regard to the pleadings in this action — particularly in regard to the declaration — The declaration would fail, for instance, if the precise words alledged in it, were not exactly supported by the evidence.

But of latter years, if the substance be stated, and what is stated be substantially proved by the evidence, tho' not in the very words yet the declaration is good —

It is usual in the first place, for the Pltf. to state his character to have been immaculate in every respect, that he was always of good fame & name &c particularly by mentioning his freedom even from the abominable vice of stealing, (or whatever the offence may be) When stating that the Defts envying his good character &c, these allegations are not perhaps necessary,

1 Com. 176. 4 Bac. 512. 1 Reb. 278. Hoy. 35

In declaring in Slander it is generally and almost universally the practice to alledge that the words were spoken "falsely and maliciously" – It is said however that it is not necessary to alledge if the words are actionable in themselves for the law implies malice ~~said~~ quere as to the principle – Ex. case of Assumpsit implied by law – There is an action against husband and wife for necessaries furnished the wife – Merely stateing the facts without specially alledging the promise supposed not to be sufficient – altho the law implies a promise – From C's. L.

B.N.P. 8. Exp. D. 516.

When special damage is of the gist of the action ex qua. Case of Marriage not enough to aver a general loss of Marriage but the Pltf. must state the particular marriage which she has lost by means of the slander per. Kent C.J. 2 Johnson 118. cited Cro. J. 449

for they are not proved – however they are usually made. But it is essential next to state the words spoken – and that they were falsely and maliciously spoken – the place and time are next to be stated, and that ~~that~~ they were said in the hearing and presence of A. & B. &c.

When the word maliciously is left out, the declaration has been holden good after verdict – But the ground was that the word "falsely" implied the malice – If such a meaning could be given, it would seem that the declaration was good on demurrer – However it was is absolutely necessary that either this construction should be given, or that both of these words should be inserted in the declaration, for they are the gist of the action – 1 Cow 195.

So also it is necessary that either the words "in the hearing of A. B. &c" or "in the presence of A &c. should be inserted, but it is common to insert both; & it is to be remarked, that the decisions that either might be left out, were all had after verdict – The terms openly and publicly should be inserted –

It is necessary also to aver that the words were spoken of the Pltff. But sometimes the declaration may be good without a direct averment, but by innuendo. as if A said of B. "you did steal my &c" B. in repeating this in his declaration, may

At Com. Law it is incompetent for the Deft. to give the truth of the words or any other ~~words~~ justification in evidence under the general issue - Formerly decided that might be for the purpose of mit=igating damages tho' now settled that they can not be gone into for any purpose - Esp. D. 518. 4 Co. 16. 5 Co. 125. Stra. 1200 Doug. 323.

Qu. Vide Foot vs Tracy 1 Johnson 46. } B. & P. 8. 9.

Court. equally divided —

Mo. 159. 1 Levin. 250. 2 Ro. Cro. Eliz. 486. Cro. J. 39. — Cro. Ch. 190 —

Cro. Car. 448. — Cro. Eliz. 416. 1 Roll 84 —

Esp. D. 501. Cro. J. 213. 4 Co. 17 1 Roll. 98. 4 Bac. 494.

The slandering of one's title consists of such words as heir or tends to his disinherison - Need not be actual damage to Pltf. to sustain an action remote or probable damage sufficient - Ex. say of an heir "he is illegitimate" Sed quere opinion of Vent contra who says the better opinion is that the Pltf. must assign special damage 2 John. 118 - 1 Com. D. 246.

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immediately introduce this innuendo viz. "meaning the Pltff. &c"

It is usual next to state the loss of friends &c &c, but this cannot be essentially necessary, as it is not one of a fact to be proved —

If the slander were spoken of a man in office, he must state in his declaration, that he was in a certain office which he held &c, and that the words were spoken in a colloquium concerning his office, or of his official standing —

In case the words should be spoken to apply by way of description, as if T.N. says to J.S. "your son is a thief &c — then the Pltff. must aledge that he was the son of J.S. which the Pltff. ment — &c.

But where the description is by way of additions as the addition of Esquire or of Capt. &c the Pltff. need not aledge that he is Esq. &c —

If the words spoken have relation to the existence of an other fact — as if the expression were, "I. is as great a thief as any in Eng." the rule requires an aiguation that there are thieves in Eng. In this case the principle seems to be extended quite unnecessarily for — There may exist cases however where the principle may properly apply — as where the words were "there has not been a robbery in the town of L. for three weeks but which J.S. (the Pltff.) has had a hand in" — For in this case the

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Pltff. may perhaps be compelled to prove there was one or more, but he is never compellable to adduce proof in support of his aligation, that there are thieves in Eng.—

Again if the words spoken are, A. poisoned B. the Pltff. must aver and prove that B. is dead: for the expression has relation to the fact of B's death, ~~and that of course the Pltff. must aver the death of B.~~ And if the expression were that A. killed B., perhaps the rule might by some be supposed to relate to the fact of B's death, and that of course the Pltff. must aver the death of B.— But Mr Roscoe thinks that such an aver=ment is wholly unnecessary; for whether B. be dead or not he apprehends to be immaterial, the liability of the Deft. depends more upon the intention & sum of the conversation; this rule took its rise when words were taken favorably for the Deft. in meliori sensu.

Where words not actionable in themselves, are said in conjunct=ion with those that are actionable in themselves; as if A call B. a "Rascally liar and a thief" it is to be observed that when all are connected, and stated in one count, the declaration will be good after verdict found — for the court will presume that the jury founded their verdict on such as were actionable.

But when words not actionable in themselves (there being no special damages alledged to have been suffered in con=

4 Co. 17. 1 Roll. 39.
40. 51. 65. 71. 1 Leon.
117. 1 Leo. 156. —
Cro. J. 622. —
Stra. 142. Cro.
Eliz. 268 ——

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=sequence of such words) are included in one count, and the words act=
=ionable in themselves in an other, the Judgment will be arrested after
verdict; for how can the Court determine whether the Jury founded
their verdict on the words rascal and liar or on the word thief. Mr B.
does not see the propriety of this distinction. It is hardly supposable
but that the jury will be sufficiently informed by the counsel or
the court in the course of the trial which of the words are actiona=
=ble in themselves, and which not — let the Deft. demur to that count
in the declaration which includes the words not actionable, and plead
the general issue, or any thing else as to the residue — And if this be
not done why not in this as in the former case, I presume that the
Jury founded their verdict upon that count which includes the
actionable words? —

It is a rule, that words tho' actionable in themselves,
may be proved on the trial, which are not mentioned in the
declaration — But for what purpose? — If the words be action
=able in themselves, they cannot be introduced to increase the
damages, since they may be the foundation of a separate foun
=dation action — But such words are introduced merely for the
purpose of proving the most essential aligation in the decla=
=ration to wit the malice. For as the Deft. is suffered by extrans=
=ous matter to rebut the presumption that the words spoken
were maliciously spoken; so may the Pltf. to prove this aligation

Per Kent printed defamation which is recorded in Law as the most injurious & agravated species of slander because it has a wider circulation makes a deeper impression and has a more permanent existence Ellotson vs Chetham 2 Johnson 74 Vox emissa volat – litera scripta manet –

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but for this purpose only, introduce other words actionable in themselves.

When the Deft means to rely on the truth of the words spoken, the Eng. rule is always to plead it specially, as by way of justification. In Con. it may be given in evidence under the general issue.

Slander, i.e. ~~that is~~ parol slander, is not by the Eng. law a crime, i.e. it is not punishable criminally or by a qui tam action. In Con. it has been a crime.

Libels.

Written slander is governed by much the same rules as parol slander, considered in a civil point of view.

But when the slander is written, two evils arise out of it — For as it has in a great degree a tendency to promote discord and breaches of the peace, to occasion batteries duels &c &c — the law had thought it proper to that the offence should be publicly punished —

Parol Slander it is true, has the same effect but it is in a less degree and is not calculated to make so lasting an impression, it ~~would~~ was not thought necessary to make it a public crime.

Whatever would be slander if uttered by parol merely, would

Hotchkiss vs Rothrop 1 Jon. 280 - held that the Deft. may give in evidence a former publication by Pltf. to which the libel was an answer - to explain the subject matter occasion intent &c in mitigation of damages —

Sd Per Kent C.J. that sending a sealed letter from one party to an other is not actionable & he adds that the letter must be presumed to have been sealed unless the contrary is shown - Lewingston vs Rogers 1 Caines R. 583. —

2 Wils. 403. — Fox & Lord Mansfield in dispute —

Private Wrongs.

be slander if written printed, or represented by any improper picture.

Many other things or expressions will amount to slander, by way of libelling, which would not if merely spoken —

For the rule is that every thing which has a tendency to cast contempt or ridicule upon one, or which tends to prevent man kind from associating with him, is sufficient to explain a private action equally as well as if the slander had been in words —

By writing therefore, to call a man a rascal without lies are such words are actionable without alledging special damages — The case cited in Wilson is a leading case, and goes to establish these proceeding positions. But authorities previous to the case in Wilson recognize different principles —

It was formerly doubted whether the truth could be given in evidence in an action founded on a written or written slander. It appears now settled that it may, as in other civil suits but cannot on criminal prosecution —

Vexatious Suits.

A man by bringing vexatious suits against another, subjects himself to an action to recover damages.

But this cause is not to be ranked with those that maliciously cause the party to be prosecuted criminally —

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In the latter case the loss of reputation, and personal danger, of punishment, are the principle rule of damages: Whereas in an action brought to recover for having been put to expence, &c., by a vexatious suit, that expence whatever it can be proved to be, is the ~~main~~ rule of damages —

But in order to entitle the Pltff. to recover for their cause, there must be much more in the case than that the Deft. brought his suit against the Pltff. and failed.

The following are three sets of cases in which the action may be brought —

I. Where the Deft. brought his suit before a jurisdiction not at all competent to try the case. In such an event, whatever might have been the motives of the Deft. in bringing the suit, the Pltff. ~~shall~~ shall recover of him all the actual expence which he has been put to, as well as for his loss of time in being compelled to attend upon such suit — The question is not here whether ~~whether~~ or no the Deft. brought this suit to vex the Pltff., but whatever might have been his object, cost and damages were incurred by the Pltff. and he in return has a right to awarded damages.

II. When a man brings a suit against a J. knowing perfectly well that he has no right or claim whatever to recover but sues him merely to plague and vex the ~~Deft.~~ Pltff., he (the Pltff.) shall recover in this suit —

Co. 2. 132. Band.
228. 1 Vent. 12.
Hob. 206. 4 Co. 4.

1 Ven. 114. The
ending case in
in Hob. 206—

Private Wrongs.

In this class of cases ~~[illegible]~~, the very gist of the action is, that in the former suit the object of the Deft was to vex and spite the Pltff. As where A. an opulent man had been much offended with B. a poor one, and brought suits against him to a very large amount, but conceived that B. owed him nothing, and that it was merely to vex him.

III. But it may also be brought thirdly; altho' the Deft had a demand a right of action, and altho' the suit were brought in the proper court; yet when the Deft had conducted his suit in an improper manner so as maliciously to vex and plague the Pltff. as if A. from spite perhaps, sue B. a poor man who owes him $50 and brings his action for $2000 so as to deprive B. of procuring bail — Or for trifling rent, the Deft distrained all the Pltff's personal property, thus depriving him of the power to relieve. So in cases of the following discription, Viz. where two merchants both very rich were in partnership, separated and became the most bitter enemies — While one of them was absent to St. Kts. buying goods, B. the other took his note against him for $500. and went to N. York, and caused him to be arrested in the street. This was in order to alarm A's creditors, and bring them upon him, for A. was immensely rich at home, but happened to owe largely for goods in N. York. The creditors were alarmed, and were about to pursue the most ridged measures, but accidently discovered that it was all a matter of spight in B. — A. afterwards on

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his return to con. sued B. for a vexatious suit — Mr Reeve was of opinion that he ought to have recovered, but a divided court gave judgment for B. the Deft. principally on the ground of policy, not wishing to make any rule restricting the power to go out of the state to sue, tho' both the parties lived in the same state — however this case shows the principle — for the law shall not be made a cloak to cover malice —

This suit cannot be maintained, untill the suit claimed to be vexatious has been ended some way or other — either in judgment or retraxit or discontinuance or abatement &c.

Nor is the action maintainable, except some damages as loss of time or pecuniary damage, has been sustained in consequence of such suit — But for mere trouble and vexation of mind the action can not be brought, and sustained —

However if there be any pecuniary damage, this plague and trouble will undoubtedly enhance the damages given by the jury, for they are generally in such cases liberal in a tolerable degree.

In Con. the Pltf. recovers treble damages if he maintains the suit — the Deft also in such case is subjected to a fine —

Malicious Prosecutions.

In an action upon the case for a Malicious Prosecution, if the

Balk. ———
Cost — ———

Private Wrongs

Pltff. prevail it is usual to give very large damages — Not only because the reputation and the existence of the suppose may be at stake, but because of the base invidious disposition manifested in the person who procures the prosecution —

The actual expense incurred therefore is not at all the criterion of damages in the suit — Altho' the particular expense incurred may be shown, and will doubtless aggravate them — for according to the nature of the case and its circumstances the jury bring in as they please —

This prosecution must have been maliciously procured and with no probable cause to think a conviction might ensue —

For altho' the prosecution may be malicious — yet if there existed a probable cause of conviction the action will not lie —

By probable cause of conviction, is meant such a fact or such a concurrence of circumstances, as that a candid conscientious man, intent on the good of the public, would think that there were such grounds for suspicion at least, as that he ought to be tried —

This is to be found in the books that there must have been a felony committed, (if the case were respecting a felony) or there would not be probable cause —

Private Wrongs—

Mr Reeve thinks that by far the better opinion is, on this subject, that there need not have been a felony committed, and such has been the decision of the superior court in Con.

But without malice in action Mr Reeve thinks is not sustainable, but that it is if there be this malice, particularly if there be such malice as the word in its common sense imports, altho' there be no commission of ~~felo~~ felony. But perhaps these are doubtful points—

If the Grand Jury had found a bill against the person, the Deft. is accused to be prosecuted—then the Deft. is saved the trouble of proving that there was probable cause — But it then remains for the Pltff. to make out his malice.—

The same also would be the case of a justice, or other examining officer, to conclude there was probable cause and bind over or act as they chose—

The only ground there upon, which the Pltff. has a claim or certainty of gaining, is to prove the malice of the Deft. and that the Deft. knew that there was no probable cause—

Assault—

An assault is an attempt or offer, with force and violence to do a corporal hurt to another—

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It is distinguishable from a Battery in that an assault is but the attempt, whereas a battery is the actual commission of the act.

In an action of Trespass vi et armis damages are given, not only for the fear and interruption of business, which it would cause a man, but great consideration will be had for the insult offered —

It is very seldom indeed, that an action of trespass is brought merely for an assault — without a battery, but it may be.

It has been a question whether mere words without a menacing posture or action, would amount to the idea of an assault — the elementary writers generally agree that they cannot — Mr Reeve apprehends that no words will entitle to their action i.e. an action for an assault without attended with an actual attempt or offer to do such corporal hurt —

But Mr Reeve also thinks that mere words attended with a concurrence of circumstances may give a right to some kind of action as of Trespass on the case —

Blackstone says that the assault must be accompanied with such words and actions, as would put in fear ~~the man~~ a man of ordinary strength and nerves — Mr Reeve does not take this rule — for that which would be no interruption in the business of one man, and would occasion in him no disagreeable feelings would be a most serious misfortune to one who did not possess ordinary firmness.

Private Wrongs—

What would be actionable therefore in favor of one man, would not or ought not to be actionable in favor of an other—

But when the action would be sustainable and when not, would depend upon the relative situation of the parties and in==shape their mental situation at the time—

Mr Bennet therefore observes that they were on the case, may under certain circumstances lie for such words—as a man of ordinary strength of nerves would not mind—

Battery—

Battery is the actual exertion of violence, upon the person of an=other— the time however is generally included under every injury done to the person of a man, in an angry, resentful, or rude or insolent or wanton manner.

When the injury is merely accidental, even the action is main=tainable, provided that the Deft. had been guilty of any negligence or even about unlawful business—

To constitute a battery therefore, there must have been either an unlawful act, or an act whether lawful or unlawful, unskillfully, or negligently conducted—

If the business be lawful, yet it must have been pursued in with ordinary care— It is not required that the act be done with all possible care, but such as men of ordinary carefulness

Private Wrongs.

would use — ~~for~~ To this point see Bailment and criminal law.

In order to constitute the liability, it is not necessary that the damage be strictly immediate — For if A. strike B's horse whereby C. is run over or B. thrown, her action will equally well lie. The law on this subject has been involved in much obscurity. But Mr Reeve is of opinion that it is now settled by the celebrated decision called the <u>Squib case</u> — If we were to be governed by strict logical reasoning, this might appear perhaps <u>wrongly settled</u>; but no inconvenience can result from this decision & it is well it should be settled one way or the other —

It need not therefore be a blow with the fist, or an instrument. For if men or boys be at play, or wrestling, snowballing &c &c and one of them throw any thing as a snowball in a wanton manner, and hit another person as he passes, such person may in a <u>civil</u> suit recover damages for the injury. Or if one spit in another's face or throw water &c this is equally a battery for which an action may be supported — So if one whips a horse whereby any injury accrues to the rider, the action will lie, provided it be done without provocation, or solicitation in the rider. Or if it be done merely to see how the horse would take it to see him run or jump &c.

The action will lie where the injury affected, or the act done is against the inclination or will of the person doing

it: for this of itself does not excuse —

But where no kind of blame whatever can be attached to the doer, the action cannot be supported — The commission of the act must therefore have been in pursuit of some law=ful business, and must not have been guilty in any degree of negligence, i.e. ~~that is~~ he must have pursued lawful bu=siness, with all that reasonable caution which a prudent man would have used — As where a soldier was performing his exercise and accidentally hurt a man, he was not holden liable because he had done it with reasonable caution — So where one man seeing another lie drunk in the street and out of pure philanthropy (not that of a modern philosopher) and to conceal his shame was putting him into a house and he accidentally got hurt, and then sued the person assisting him the action would not lie —

So where one was riding a horse, which was not any memorable ungovernable, but which being suddenly frightened ran away with the rider and broke an other man's leg: the rider was holden not to be liable —

But it has been attempted to draw a distinction between wild, and wholly ungovernable, and those which have been broken to service — Some distinction might no doubt be used in these cases; but if common prudence

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be used, Mr. Reeve concludes, that the one who occasions the injury, ought not of course to be subjected for small men who are bringing up horses to be compelled to break them in their own fields & and prevented from riding them in the streets.—

But in all cases, if there be any negligence on the part of the Deft. or if he be not in pursuit of proper and lawful business, tho he conduct such lawful business with great caution, still the Deft. shall be liable tho' the thing happen against his will.—

But in case of recreation, wrestling, pelting with foil &c if the parties mutually agree to it and an injury ensue, no action will lie — except perhaps there should be foul play.—

It is a custom in Con. when a militia officer is chosen, to do him honour, i.e. pass by him one by one, and fire down pretty near him — one was chosen near Litchfield and in doing him honour, one fellow fired so near him as to crack his ancle bone — the was none on him than the next, and appeared to fire no nearer — no wadding or powder hit the officer and the soldier was not intoxicated, tho' tithe the next day, neither was there the least appearance of spite or malice — and yet the action brought by the officer against him was sustained tho' by a divided court and against Mr. Reeve's opinion — on the ground that the soldier, in trying to honour his officer a little more than the rest, must have loaded his gun imprudently heavy, (for as to this, there was no positive proof — and that therefore

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2 Dec. 174—

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tho' if the practice was perhaps authorized, by custom, it had not been followed with due caution —

It is said down in the Eng. books that where two persons agree to go out and fight; and one sues the other for a tort done him, the agreement will be of no avail to the Deft. such agreement & fighting being unlawful — But We have questions very much the propriety of this principle — In a criminal prosecution there is no doubt of its correctness. The agreement would be of no avail. But in a civil suit, altho' the injury is purposely done, yet with what an ill grace does one of the parties come into court and claim damages for the breach of that law, which by express stipulation he agreed to break. We have think it more agreeable to law, to policy, and to reason, that the Pltff. should not recover.

There are many cases wherein a jury, upon a consideration of the circumstances, do not think that in justice the Pltff. should recover anything at all; and that he had been sufficiently right enough. (as when for violent abuse to the wife, the Pltff. was carried upon a rail) But having received an injury which they find to have been committed, the law obliges them to give some damages or a farthing. But We think that the jury in such case ought not be compelled to give any thing — for if they may whittle it down in this manner to amount in effect to no compensation, why give nominal damages?

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But it is said that the Jury ~~it is said~~ ought to give some on account of the flagrant breach of the law.

This principle is too often introduced to aggravate the damages, in a civil suit: but it is essentially wrong. If a man has been guilty of an open insult upon the a violation of the law, is he not punished for it criminally, or liable to be so punished? If then the Jury give higher and vindictive damages, or any damages at all in the case just, the Deft. inevitably gets punished twice for the same offence — ~~that~~ than which nothing is more contrary to the spirit of the law.

However there may be some cases wherein the law not having provided for its own vindication it may be proper to introduce the principle, as in the case of Slander in Eng.

False Imprisonment.

A Battery includes in it an assault of course — a false imprisonment includes within it, both a Battery and an assault.

Every restraint of one's person of Loco motion, whether in a prison, in the high way, or ~~any~~ any where else, is an imprisonment, and if their restraint be without authority, or with authority unlawfully exercised or executed it is false imprisonment, and actionable.

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An action may therefore be brought against a justice of the peace, who maliciously and carelessly grants a warrant to arrest the Pltff. for a supposed crime, without any information and no crime having been committed — but as the sheriff is here bound to execute the warrant, the imprisonment shall be considered as proceeding from the Sheriff only — But if an information be laid, an action on the case is the proper remedy —

This action is not usually brought except against sheriffs, &c. where there has been an arrest without proper authority, or by authority improperly executed. The action of assault and battery being generally substituted (for where one beats an other and gets him down it is a false imprisonment.)

If the arrest be an illegal one, the officer may or may not be liable as the case may be.

On this subject the courts in common law since these the U. S. courts have settled an important distinction, for in the Eng. Courts there is a diversity of decisions which make the subject complicated —

The sheriff, or other officer in his situation, is obliged by the law and is presumed to be well acquainted with the laws of the land — When process is delivered to be served the officer is to examine it, and to compare the law with it, and if on the face of it, it appears good, it is enough that he has to execute it, and that it

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be illegal, if such illegality proceed from something de hors, he shall not be made liable—

But if from the face of the process, it appears not to have been properly issued or to have some other material defect, then the sheriff becomes liable if he execute it—

Thus it is a law in Con. that a justice shall not have cognisance over a particular species of dispute or claim, for other than to the extent of $15 not being limited as to claims of an other sort now if a justice direct a capias ad res. to the sheriff, for a sum to exceed the sum of $15 — The cause of the writ appearing on the face of the writ, to be that wherein the Justice is convicted in his jurisdiction, to the sum of $15, and the sheriff serve such a writ with so by attaching the respondent's body, then the sheriff is liable for an action of battery or false imprisonment; because he comparing the law with what appears upon the face of it the writ, it will prima facie appear that the Justice had no jurisdiction, and of course that the process is illegal—

But otherwise if the writ were a capias ad satisfaciendum, or a writ of execution, for a third it were for $10 yet it does not appear from the face of the instrument that the judgment was rendered on a cause of which the Justice had no jurisdiction— Nor shall the sheriff at any time be compelled to examine the record to ascertain the fact—

Private Wrongs.

Much confusion has on this subject originated from the phrase Marshalsea case — this case tho' not contradicted, is not now considered as Mr Reeve alledges to be law — the case cited to such point, are without doubt good law but certainly they do not establish the point for which they are ~~established~~ cited — for where a sheriff executes a warrant for treason or murder, which issued from the Common Bench he was holden liable as sure if he ought to have been, for by comparing the law of the land with the writ, he would have found the writ void, the Common Bench not having cognizance of criminal causes —

If from a comparison of the law on the the process, whatever it be, and if such process appear on the face of it to be good, the sheriff must execute it — and altho' in fact the sheriff knows ~~in fact~~ that in fact the court had no authority, yet this not appearing from a comparison of the law with the face of the proceedings, the officer is not liable and must ~~not execute the it~~ execute the process — This however was but a Com. decision; but from the reason of the thing Mr Reeve concedes it to be the Eng. law — for if the sheriff from ~~private~~ pretence of private knowledge could ~~decide~~ execute the process or not — a wide door would be opened for collusion —

And the Eng. law, the Marshalsea case not withstanding

L.D. Ry. 224.

10 Co. 70 —

1 L.D. Ry. 229.
2 Strad 1184. –
2 Mod 195 –

Cro. Eliz. 227
9 Co. 66. Cro. J.
280 —

Stra. 702 —

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We have apprehended to be that when a precept is delivered to the sheriff he need never show any process antecedent to that which he had delivered to him; for he is bound to presume if nothing to the contrary appears from the face of the process, that the court acted properly.

But tho' the sheriff in such case would be excused, yet the Pltff. who procured the writ, and in some cases the court would be liable.

In the case of the Marchelsea a writ was issued against a man not one of the King's servants; upon the face of the writ however it appeared good:- suit was brought against the marshal for false imprisonment &c and the court decided the case for the Pltff.

No court has come so far perhaps as expressly to declare their decision bad law in express terms -- but it has been deemed a hard case, and one not supported by the authorities cited.

Illegal Arrests by Sheriffs.

It appears by the Com. Law that all Judicial acts on Sunday are void.

But this rule did not by the Com. Law extend to ministerial acts:-- for all service of process on that day was good. Very early however statutes were made making void arrests

(a)

The Bailpiece on which the principal is taken, gives no authority of itself — but is merely evidence of a right to take and the law supposes within it the Bail may pursue the principal out of the state —

1 Salk. 785. — mod. 95 —

So also a process for contempt issuing from Chancery be served on sunday — this rule proceeds upon the supposition that the person is in the custody of the court — it is however stretching the principal a great way — 1 Salk. 55 —

5 Co. 92.

made on persons while attending upon public worship on sunday — from time to time, prohibiting persons from ~~any~~ exercising such of their secular concerns as were attended with noise and tumult. — And at length the stat. 29 C. II. c. 7. enacted that all service ~~on sunday~~ of process on sunday — except in cases of felony or breaches of the peace, shall be void to all intents and purposes. To arrest a person therefore in a civil suit on sunday would be false imprisonment — But in criminal cases the Deft. may be arrested on sunday. So Bail on a Bail piece may take their principal on sunday; but this is not the service of process for the principal's surrender in the custody of the Bail — (a)

Out of this stat. (29 Car. II.) which has made the foregoing provision and out of this provision has grown a question of much importance — but which tho' it must frequently have a circumstance never have received a judicial decision — Suppose A. be arrested in a civil suit on Sunday and forcably detained until monday & then served with another process — On this question there is a diversity of opinion — some maintain that the last arrest is valid — others hold to the contrary opinion, and of the latter opinion is Mr Reeve — The principle has been decided both ways. In Simaine case the court held that in such case the second arrest would be good — It is an illegal act for a sheriff in a civil suit to break open an outer door to serve process, and if he do he will ~~at the same time~~ subject

Coupe. 1. That the 2d avertis good see 5 Mod 95. 6. Coupe. 6. 9. 5 Co. 92 —

That the 2d avertis not good see Coupe Jacuum vs Barnes 400 Wills vs Dowel Yeates v Belcum T.J. 17. Geo. 3. Bob 63. 202. Coupe 4. 104th. 153. 2 Bl. R. 823. 2 Burr. 1048. 1050. 6 Mod. 95. 154 4 Bac. 456. 5 Bac. 170 —

himself to an action tho' at the same time the service would be good.

This decision applies in principle, strictly to the case under contemplation — The detention on sunday is an illegal act — The service being void, and if this decission be law, the arrest on Monday is valid — But Mr. Reeve apprehends that the law has undergone an alte=ration, which is fully evinced in the case of Lee & Gansel — This case did not necessarily decide the point, but the Judges throughout the case went upon the supposition that such service as the Officers enabled to make in consequence of an illegal act should be utte=rly void —

But Mr. Reeve thinks it a perversion of reason, justice and policy for a court to suffer any good to arise to a person from his breach of the salutary laws of society — when it can be avoided for it is holding up the strongest inducements for their breach There are cases however in which it would not be proper to inforce this doctrine or principle — As where A. wrongfully takes B's horse — B. seeing him ride him off, forbids it and demands the horse and upon A's refusal to deliver him, strikes him of with a club Now the law in such case permits B. to retake his horse peaceably — but forbids such ~~more~~ force — but tho' B. is very properly subject to an action for the assaut, yet it would be improper to compell him to redeliver to A. the horse — In cases of forcable entry, and detainer, however even this is done —

Private Wrongs—

Of Justifying Battery or False Imprisonment.

Assault, Battery, or False Imprisonment may be justified there being cases where it is both allowed and required—

II. A. where a person is about to do any mischief it is proper that he should be restrained, or confined; and even if upon trial it should appear to the Jury that the person was not about to do the mischief, yet if from circumstances it appear that a person of ordinary nerves would probably apprehend mischief, the imprisonment would be justified—

Some cases of the arrest of persons suspected guilty of having committed some crime — If the person arrested should prove guilty the arrest would or would not be justifiable as the circumstances of the case might be—

A warrant good on the face of it against A. will always justify the sheriff for an assault and taking and imprisonment—

But it may also justify a violent beating and wounding— If therefore the Pltf. in his suit states merely the battery of taking and detention, the officer may plead his warrant and it will be sufficient.

But if the Pltf. not only states the battery but contain

Nov. 13 c. —

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complaint of a grievous wounding, the officer must plead his warrant and also that the Plff. resisted — tried to get away or some other thing which will show the necessity in the sheriff to proceed to the extremities he did — For it is the duty of the sheriff to take the man and at all events to keep him — His warrant of itself justifies nothing but the taking and does not justify violent beating or ill usage — But if he resist the sheriff must proceed to use forcible means, and is justified in proceeding to the last extremities rather than suffer him to go — Nor will the honour of the laws allow of any turbulence or refractoriness in the prisoner —

II. Son Assault de mesne, is a common justification. But this mesne shall be a justification, except for mere self defence: it never shall be a cloak for the gratification of any evil passion — as revenge &c. — for altho' the law cases the mantle of charity over the weakness of human nature it gives no quarter to its vices —

Here however it is extremely difficult to draw a line — Where a person is attacked he must defend himself — But if one be attacked and he know his adversary, to what extent he is allowed to beat him cannot be determined — He ought not when he has been in his power, to be compelled to let him go immediately perhaps, for if he get up he may immediately fall on him again, and kill him — Nor yet is he allowed to give one unnecessary stroke, for it would be extreme anger or revenge which

1 Salk. 64 a.
1 Ld. 246 —

1. Ld. Ba. R.
62. Salk. 64.

would actuate him — But he is allowed to beat him to such a degree as to incapacitate him from doing further ~~dam~~ injury — This there fore is a matter of judgment in the person assaulted, and to be treated and judged of by the jury from the circumstances —

Thus a reasonable son or wife master father or servant if assaulted he may proceed to the same extremities as if he were himself attacked —

IIII. A Battery &c may be justified by a <u>proper manner imposed</u> for entering the Deftts House &c.

And it is a sufficient justification, provided that the Deft. acted reasonably, that the Battery &c were in defence of his goods or house — But if the Pltff had once got possession of the Deftts Realty or personal goods he is not allowed to beat and use actual force to get possession of them again —

Many things may be offered in mitigation of damages in this action — It is frequently laid down that the Deft being in a passion would go in mitigation — This is not strictly true: a man's being in a passion will not of itself be a cause for extenuating damages, connected however with certain circumstances it is — for if the Deft was highly insulted or received strong provocation it is always considered a good cause for lessening damages

It is often a sufficient justification that the Pltff is the son, infant or servant of the Deft —

Ca Lit. 226-
228.

Salk. 11 —

Private Wrongs.

There also then is required a conscientious exercise of the judgment — so under certain circumstances this will not be a sufficient justification. The material point in such case is the motive — for if there were malice it will not excuse or justify — But the Defdt here is placed in a judicial capacity — what one reasonable man might consider a reasonable beating an other reasonable man would think was too severe — Therefore if the Defdt. acted conscientiously and governed himself by what he must from the circumstances he judged to have thought was sufficient and right he will not in general be found guilty —

Mayhem is but an aggravated species of battery upon some one or more of such members as are useful in fight —

In certain cases of battery the Eng. courts have power SUPERVISING COSTS — to increase damages given by the Jury — This rule has never been adopted in Con. and as this seems not properly the province of the Court the practice has become in Eng. almost obsolete. —

If a recovery be once had in trespass viet armis for battery and false imprisonment, the recovery will forever after bar a subsequent action for the same cause — This rule is often exemplified by the case of a man's recovering damages in this action for a battery — but after suit brought the wound received terminated in the loss of his leg; a suit was commenced for this

subsequent injury but the action could not be sustained—

Where a number of persons having been joint trespassers are joined in the suit the damages cannot be severed or apportioned And if the suit be commenced against one only still it will be a sufficient bar to an action brought against any or all of the others.— For where the action is against one only damages are given commensurate with the whole injury—

But if a number be sued they may plead differently; as if one plead ~~son~~ assault demesne and an other some other justification and a third the general issue.— ~~Here~~ There must of necessity be ~~three trials~~ different trials and trials at different times. So if one joine issue to the jury and an other on demurrer to the court— But tho' there be different forms and different trials yet execution goes out only for one sum in damages. The execution goes out against both, if the pltff prevail against both for that sum which was first awarded;— As the pltff ~~cannot~~ can recover such damages only as were first given yet both the prisoners are liable to him for that one sum, and he may cause his execution to be levied upon any one or all of them as he chooses— Thus A. sues B. & C. in trespass vi et armis for assault battery &c B. demurs to the declaration C. pleads ~~not guilty~~, the general issue. C. is tried first and judgment given for $800— Afterwards B. fails in his demurrer and judgment goes for the same

Private Thoughts

sum ($800) in favor of A. execution then goes out against both for the same sum of $800. and may be levied on A. or B. or both, but only one sum can be recovered —

The rule would be the same if B. had plead son assault demain — or any other good plea and C. had plead a different plea, or the General issue, or had made default; But in no such case can the Pltf. cause execution to be levied except for the one sum if he chuse however he may compel B. to pay $400. and C. $400.

If two, B. & C. be guilty of a battery and they both be joined in an action for it and they both joint in the same plea: the jury sometimes thought proper to sever and apportion the damages between them. They may bring in therefore that B $50. and C. $40.

In such case the verdict is bad, if A. elect to treat it as bad and set it aside; but the Defts are bound by it if the Pltf. chuses to treat it as good — But in such case the execution can go out for only one of these sums. A. may therefore take out execution for $50. And since A has a right to ~~look~~ look to both or either for his recompence, the execution goes out against both, and as in the former case may be levied on both or on one only at the election of the Pltf. Then C. who was awarded to pay only $40 may be compelled to pay the whole $50. But if the Pltf. object to the verdict the court will not ~~and~~ accept it and the jury will be sent out again —

Mr. Reeve considers that no satisfactory reason can be

Earth. 19. —

Sta. 1922 —
B.M. p. 20 —

11 Ro 5 —

Private Wrongs—

urged why execution should not be taken out for the whole aggregate sum of $90. but so the rule is—

So if B. make defaultt and C. appears, is tried and convicted and $50. damages given, still the execution which goes out against both may be levied attag either upon B. — but if B. be tried and acquitted whereas C. is found guilty, then execution can goonly against C.—

The time is immaterial in trespass for if one time be stated another may be proved. It must appear however from the face of the declaration that the time is within the stat. of limitations.

The construction of the action of trespass is peculiar in this respect viz. that a number of distinct batteries upon the same man by different Defts. may be joined in one action against all — The Jury having found the different times when the different batteries or different trespasses were committed may proceed to apportion the damages between each —

If the Deft in the civil suit had been previously found guilty in a criminal prosecution the verdict shall not be taken advantage of in the civil suit; and particularly because perhaps the very verdict was procured by the Pltfs own oath — Nor on the other hand shall the verdict in a civil suit be given in evidence in the criminal one for them

Private Wrongs—

there is better evidence ~~the~~ by the Pltf's oath—

Replevin—

This action is to redress a private wrong to the property of the Pltf. by an immediate and direct invasion of it—

The word "REPLEVIN" is interpreted to signifie the substitution of one pledge in the room of another.—

II. The writ is brought in Eng. for two causes 1st when property is distrained for rent:— 2d. where cattle &c are distrained damage feasant—

Before this writ was given the Lords of manors was very great in respect to distresses for this ~~work~~ the most oppressive of feudal tenures—

III. In Con. the whole of the Eng. law respecting distresses for rent is excluded—

This writ applies secondly to cases of distraining cattle. In common cases of an amotion of injuries done to property there is no other remedy than to bring suit and wait the tardy motions of a court, but in this case the cattle which do the injury may be taken for the injury done, and if the owner of the cattle will bring replevin and change the security he is allowed to get possession again of the cattle— in the mean time the person injured

Private Wrongs.

keeper the security until the debt is paid —

The writ of replevin does not therefore in these cases deprive the person of his security but merely exchanges it — being compelled before he can get back the cattle or other thing distrained to procure the bond of some secure and unexceptionable person, that whatever damages ~~are~~ should be ~~ass~~ tained by the jury should be paid or the cattle returned — As if in the prosecution of the action for the trespass judgment be recovered and the execution prove ineffectual then the bond will be forfeited and the Plff. might come upon the security —

III. But there is another class of cases wherein this ~~class of cases~~ writ applies in Com. but not in Eng. Viz. where the Deft. is attached by his property to answer unto ~~cases~~ suits brought against him — Property thus attached must be considered by the Com. law as in the custody of the officer or of the law until judgment — But the Com. law has given in this case the writ of replevin — whereby the Deft. may retain his property by an exchange of the security — as in the preceding cases.

I. Most of the cases which occur wherein the writ of Replevin is used are cases of distress for rent arrear —

The Com. law of Eng. was originally regardless of the rights and privileges of all others than the Nobility and great men of the time — Their disposition to favor exclusively the

rich and great, was peculiarly manifested in the law of Land lord and tenant — Whether rent was really due or not the landlord to gratify his tyrannical disposition or to fill his purse, would distrain perhaps one half of what ~~he is worth~~ his tenant was worth and if the sum demanded was not paid in a short time would sell the property and raise the money — was had the tenant any relief but in the slow process of a law suit —

To redress so great a grievance the writ of replevin was given — This enabled the tenant to redeem his property by giving good security that, what was due should be paid or the property distrained delivered — And as every lord of a manor was surrounded by others who were his rivals or violent enemies — perhaps the tenant was not difficult to ~~negot~~ get the requisite security — After distress and replevin the course was for the tenant to summon the Lord as a trespasser at the succeeding court — If at the trial the Land lord show that rent was due, this when ascertained the tenant is awarded to pay — and thus at the Pltf. in the case judgment will be against him as if he was Deft — but if no rent be proved to be due judgment goes against the Deft. precisely as in the ~~case of a common trespass~~ common action of trespass; the jury awarding such damages as they may think proper —

Private Wrongs.

This court for this purpose is wholly excluded in Con- and very little used in the U. States —

III. The second cause for which this writ issues in Eng. is in common use over the U. States —

Whoever finds in his field horses, cows or other animals doing mischief has two remedies whereby to remunerate himself for the damage done — to wit — he may commence a suit for the trespass and ~~are~~ wait the determination of ~~the court~~ a court of justice; or he may immediately distrain and confine them both that they may not break in again and as security for the damage done —: for while in pound the cattle are considered in the custody of the law, and must there remain as security for the damage unless the parties compromise or unless they be replevied —

If the parties can agree as to the quantum of damage done and whether the fence was good or not and they come to a com=promise the keeper of the pound will be compelled to deliver up the property. If the object cannot be accomplished by this mode a writ of replevin must be sued out and a bond substituted in the room of the cattle —

When the writ is obtained the Plft. in replevin must summons the ~~distrainor~~ distrainor to appear at court as a trespasser: The amount of damage if any are now ascertain=ed by a jury and or in the other case judgment will go for the

Private Wrongs—

Deft. who will recover damages of the Pltf. and as if deft execution will go against him—

But if the Defts. fence was not a good one i.e. not a law=ful one, judgment will go against him the injury done notwith=standing and he will be compelled to pay as a trespasser for com=pelling the cattle whatever the jury may say—

In Con. and in moste of the states the law has asce=tained what shall be considered a legal fence: in Eng. this point is left to the jury—

But if the cattle entered the land over a fence boun=ded by the highway the law may be essentially different—for the Com. law is that provided the fence bounded the highway and if the cattle entering were not commonable theorte they should be distrained and the distrainor should recover dam=ages attho' his fence was bad — Thus if hogs get over a fence from the high way which is a bad fence and do injury the owner shall be liable and the animals impounded; for hogs are not commonable animals—

There is a statute in Con. allowing the several towns to make by-laws in order to regulate ~~and~~ this and other sub=jects — The Court of E— made a law that hogs if ringed might run in the high ways before this and at Com. law if any one found a hog in the street he might cause it to be impounded—

Private Wrongs

This law preserved the hogs from being thus impounded. But a question arose whether the owner was not liable to pay for all damages they committed, this law notwithstanding, if they entered any man's field provided that the fence was bad or unsound there was none? After many decisions that it was and that they were distrainable, the question was taken up to the Superior Court — it was there decided that they being the law, hogs were on the same footing with horses and were distrainable whether there was any fence or not, forgetting in the lot of an other man —

In respect to fowls, geese, turkeys, &c. the law seems to have made no provision — If they enter the lot or ~~guardian~~ garden of an other Mr Reeve has had doubts whether they may not be treated as animals *feræ naturæ* i.e. killed or treated as the owner or person of the land may think proper — lawyers on their subject have had different opinions — but if one would sue an other for killing his hens which were lounging in a ~~guardian~~ garden Mr B. thinks nothing would be recovered —

The following case mentioned in Com. some speculation A. had taken B's cattle *damage feasant* and impounded them, B. replevied them ~~ad~~ and brought his suit as for trespass against A. before a justice the cattle had done mischief to the amount of $20. the Justice's jurisdiction extended only to $14. The bond which was given as a security in exchange for the cattle was as the

Private Wrongs

the custom is for all the damage &c — As the Justice had no juris-diction over so large a sum as £20, which the Deft. proved to be due. have been done the case must of course be discharged. The question then was whether the bond was not discharged since the Judge rendered no judgment — and the case was destroyed — The person injured was then as contended deprived wholly of his security. But the question did not receive an ultimate decision and Mr Reeve is of opinion that the bond may be immediately sued upon —

The action brought by the person whose cattle have been distrained is in form. and if no damage be proved, or the hence (it being between neighbour and neighbour) be proved to be an ille-gal one it is in substance a mere action of trespass vi et armis on the Deft. making this point as above — Otherwise the action and pro-ceedings are some what different —

If the sheriff or keeper of the pound should suffer the cattle to escape, an action on the case for an escape will lie as in cases of escapes of human persons from the officer —

III. The writ of Replevin will lie in the third place, in cases of process by attaching the Defts. goods to compell him to appear in court — This is an extremely beneficial rule, but is entirely unknown to the English law — But whenever the benefit of the writ of replevin is extended to this class of cases, it becomes the most important ~~decision~~ decision of this title

Private Wrongs—

Where the benefit of this writ is extended to this class of cases a creditor may for a trifling suit attach and take away all the property of the indigent debtor even of his last cow — and thus deprive him of all means of subsistence untill the tardy motions of a court of Justice has decided upon the claim —

But in Con. when a debtor's goods have been attached, if he can procure good security in lieu of them, he may replevy and his goods and hold possession untill the determination of the suit; but in this case the security must be most ample for it would be wrong to deprive the creditor of his pledge for his debt without substituting another at least as good as the bond of a man in good pecuniary circumstances would be —

The replevin in this case is not an adversary suit i.e. it is not such a suit or action against an other as is now to be tried but the object of it is merely to get back the property and to lay a foundation for a subsequent action on the bond —

The writ therefore is merely entered on the files of the court but not placed on the docket — or called — In the event of the suit being determined in favor of the Plff. and upon execution non est be returned or if in other respects it be ineffectual, suit may be immediately brought upon the bond —

A question somewhat difficult of solution has been raised under this Con. law — if creditor brings a suit against

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a debtor stating the damages very high and all the property attached is one cow A. gives a bond in the common form as security and the cow is replevied — The question is does the obligor of the bond become liable to pay all which should become due the creditor; or is he bound merely to pay the value of the cow — according to the letter of the law and according to the ~~litle~~ literal ~~wit~~ construction of the instrument A. is no doubt bound to pay the whole debt — But We believe conceives that such ought not to be the construction — The object of the stat. we should consider is merely to place in the hands of the creditor as good a security as that which is taken from him — and to place the parties in a relative situation much the same as that in which they previously were —

The case is certainly in analogy to that of giving bail bond and the rule ought to be the same —

A. sues B. C. gives a bond for B's appearance at the trial B. does not appear judgment goes by ~~the~~ default — In this case if — surrenders up B. any time before a non est is returned his bond is discharged and yet the bond is literally forfeited — But according to the construction given there is no forfeiture — and the reason is that the object of the law allowed is merely to place the parties in the same situation as if the body of the Deft. had not been released and if before a non

non est has been returned by the sheriff, the body be delivered up the parties are precisely in the same situation as if no bail bond had been given —

If the sheriff have a writ against A. at the suit of B. and being in A's possession the sheriff attach the goods of A. can A. replevy them? — this question must be answered in the negative. The reason is the writ of replevin counts upon an existing suit between the person replying and the person at whose ~~have~~ suit the goods were attached in the case put there is none — Trespass vi et armis but replevin will not —

A question has been raised ~~from~~ t' in Con. whether the Pltff. might not be compelled to take bond of the Deft. himself when the goods are replevied, the court or justice said yes thinking a perfectly good security — This however will not answer the law, for it would be turning a process by attachment into a mere summons — It was however decided that the purposes of the law were sufficiently well answered in this way — And that the justice who took ~~the bond~~ such a bond acted judicially and that acting in a judicial capacity he could not be made liable if he did ~~an~~ err for an error in judgment — This decision was reversed and the law settled as above, both for the reasons then given and because the justice did not act judicially but ministerially or in a

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parallel case the sheriff or other officer acts ministerially when he takes bail. This is in a degree a matter of judgment, but still if the sheriff take insufficient pledges he is liable—

Trover &c.

This is perhaps the most extensive of all remedies in cases of tort—

Damages are obtained and not the thing sued for in the action.

In whatever mode the Deft. really came by the goods, whether he stole them or found them, or were given to him without vesting the title, or in whatever other mode they might have been acquired the Pltff in his declaration states that they came by ~~them in~~ WRONGFUL and that he converted them to his own use—

The form of this action appears not to be very ancient; but it has now become so general that except in some few cases to be hereafter mentioned, it is impossible to conceive of a case wherein it will not lie—

There are three different classes of cases in which this action may be brought—

I. Where the Deft. came wrongfully by the possession of ~~not~~ the goods—

II. Where the Deft. has come by ~~it~~ them rightfully enough

Inv. x. p. - ——

but has exercised some act of ownership over it—

IIII. Where the Deft. has come by it rightfully enough and where no act of ownership has been proved but where the Deft. name he refuses to deliver it on demand—

In the two first of these classes of cases, no demand previous to bringing suit is necessary to be proved—

But in the last case, which is where neither the Pltf. can neither prove that the Deft. came by the property wrongfully or that the Deft. has sold it, burned or concealed and other act of ownership over it becomes necessary to prove a demand & refusal.

This demand and refusal is evidence in most cases of a conversion; but not always tho' at the same time the refusal be not accompanied with any claim of title or right—

The following example is an exception where the refusal is not accompanied with any appearance of a conversion of the property to the Deft's own use — As where A. finds a watch in the street and B a stranger to him comes and demands it without showing sufficient proof that it is his — here there is no manifestation on the part of A. of an intention to convert it to his own use. Whenever therefore this intention to convert is not sufficiently manifested unless the case falls within either of the two first classes of cases, trover is not the proper action—

Hence it is that if the Jury find the facts specially

Private Wrongs—

stating the refusal to deliver ~~the~~ but without finding a conversion, the court cannot give judgment—

The action of trover is solely confined in its application to personal property: therefore if one take growing corn trover will not lie for it—

This action is in many cases concurrent with trespass vi et armis — to wit — in all cases where there is a tortious taking except in some few cases arising under Bailment—

Where the delivery of the property is procured by fraud and for the purpose of absconding trust the taking is tortious and trover will lie

But trespass is the only action where the taking is accompanied with the immediate destruction of the article — But if the Deft. had taken it home and there destroyed it — or if he had moved it a rod and then destroyed it trover will lie; for then the property may be said to be converted — for A. shoot B's horse in the field trespass is the only action but if he had him out and then kill him trover is concurrent with trespass.—

In this action the Pltff. should state in the first place that he has a property in the thing and that he (Pltff.) had the possession — then that it came to the Deft by finding and lastly the conversion: but the evidence of the conversion he need not state—

Hence arises the rule that the Pltff. need not

Private Wrongs.

state a demand and refusal for these are only evidences of the con=
=version —

Whereas in Assumpsit a demand must be stated for with=
=out a demand in many instances there can be no demand — A
Assumpsit — The essential points therefore for the Pltff to state
are his property, his possession at and before the taking — the Deft.
finding and subsequent conversion —

The conversion may be proved in either of three dif=
=ferent modes as the facts happen to be — 1st By a wrongful
taking which is of itself evidence of a conversion — 2nd By a
rightful taking perhaps, but accompanied by a burning or sale or other
actual exercise of ownership over the property and 3rd If the possession
be acquired ~~wrongfully~~ rightfully and no disposition of it, such as would be
=ed an exercise of ownership over it can be proved, then by pro=
=ving a demand and ~~ownership~~ refusal —

But an actual possession in the ~~Pltff~~ Pltff. is not nece=
=ssary to be stated since the action is not merely for an invasion
of possession but property — therefore if property be stated and
proved the constructive or implied possession is sufficient —

The effect of judgment for Pltff. in trover is to vest
the property of the thing sued for in the Deft. because in this
action as in almost all others concerning personal property dam=
=ages and not the specific thing are awarded and awarded as an

(2)

In it appears trover will lie after the thing removed is assumed to the owner —

equivalent for the thing itself –

If two persons take and convert the property and only one be sued the property becomes vested in that one who is sued, fait is he who gives equivalent damages for it.

But the law is otherwise if either before or after the commencement of the suit, the property for the taking and conversion of which the suit was brought the was returned to the Pltff – for in such case the title – the property of the goods still continues in the Pltff., who recovers damages only for the taking – the value of the goods not being taken in the account with the Jury in making up the damages – (a)

If the Pltff. have only a special property in the things taken, it will be sufficient and he will recover damages for the whole value – But in such case the man who has the general property also may bring the action: but both can not bring it at once – but the one who shall commence his suit the first shall bring the action –

Thus an ordinary Bailee as well as the Bailor may bring the action against one who has acquired the possession when it was in the Bailee – for the Bailee has a special property.

But a mere naked depositary is not entitled to it in his own name altho' there be some cases wherein he has brought it – But in these cases the question was never

decided that he could, but it passed Substantio.

There is a rule that the Bailee cannot bring trover against the Bailor in any case, tho' he might bring trespass on the case. As where A. bails to B. a yoke of oxen upon hire for a month and A. re==takes the oxen before he ought — to wit — in three days after the delivery. Mr Reeve does not see the impropriety of the rule but root is that in this case trover will not lie in behalf of the Bailee but that an act=ion of trespass on the case will —

If the property come to the possession and be converted by many the Pltff. may bring his action against any one of them — As if A. trover B's horse and sell him to C. who disposes of him to D. B. may bring his action either against A. C. or D. at his election — For altho' in this case C. and D. are innocent and have equal equi=ty with B. yet B. has a legal right and an equity of longer stan=ding and qui prior est in tempore potior est in jure.

And whomever is sued in the action, of the three, in him is the property by the action vested —

But if the suit be ~~in A.~~ against A. altho' the property is vested in him by the suit yet he is estoped by his sale to C. from taking it from him by the suit or enforcing his claim against any of the subsequent holders of the property —

The maxim however that qui prior is in tempore potior est in jure — does not always hold good — for if the person

Bur
v. Willett Rax

the case in Salk.
is said not to be
law the motion
this ground –

Private Wrongs—

whose property was taken was deceived and thus suffered himself to contribute in any degree to C. ~~and~~ D. or E's getting possession of the goods, then C's or D's right to the house or other things is paramount A's right: for A should not have so ~~considered~~ conducted or have suffered himself to be so defrauded—

A distinction is made between cattal and articles and money— For altho' trover will lie for money in a bag, or any money which will be specified if brought against the first taker; yet it will not lie against any other person to whose possession the money subsequently came— This rule is founded in policy merely & applies only to sums of money or in current—

Bank bills however and negotiable notes tho' not current money are placed on the same footing as ~~with~~ money—

An ineffectual execution or judgment against one of a number who have trovered property will be a complete bar to any other action brought against any other of the wrongdoers for the same cause —

For this rule there are two reasons first because this action is founded upon tort, and in all torts a judgment merely is a complete satisfaction; altho' no execution be taken out upon such a judgment — But this position is not meant to establish the point that no suit or recovery can subsequently be had on such judgment; for this may be done—

Private Wrongs.

No plea is allowed in trover but that to the generalissa of not guilty — or the special plea of a release — No other than these are allowed. The reason of this rule is not discoverable and is not adopted in Com. where other things may be plead —

In some cases the property which is the subject of the action, may according to the principles of the Com. law be brought into court and will go in mitigation of damages i.e. the Pltff will retake his property and receive also such damages besides as the Jury will give him —

But no very bulky article as a pipe of wine &c can be thus tendered — Nor will the Pltff be compelled to accept the article if injured materially — This rule seems to have been formed with a view to cases of actions brought for family pictures and things of that sort —

When property is holden ~~severally and~~ jointly or in common — one tenant cannot bring trover against the other —

To this rule there appears one exception — whenever it turns out in proof that the tenant who was sued by his companion has destroyed or sold the article which is the subject of the action, or caused it to be so — then this action will lie as between them —

In other cases there was formerly no relief in such other cases when this action would not lie — But the action of

account was afterwards given in Eng. to one joint tenant or tenant in common against the other —

But if for the invasion of the inheritance of the partnership, only one of the tenants brings the suit without joining the other, the Deft. may abate the writ :— But there is no other mode whereby the Deft. may take advantage of the defect —

It has been made a question whether if wine (or other things of the kind) be taken out of a pipe and the rest injured by putting water to it — the action could be brought for the whole including that which was injured — or whether trover would lie for that only which was taken out — Dr wined delivered to B. a cask of 60 gallons of wine as bailee to carry — B. took out ten gallons for his own use and filled up the cask with water whereby that which remained was injured —

Trover in the foregoing case was decided to lie for the whole of the wine delivered :— or trover for the ten gallons and the rest on the case for the residue — To permit trover to be brought for that which was never taken away but which might have been delivered as directed is however to extend the principle a great way

A case is to be met with in the books that if a servant commit trover by his master's command, the master only is to be sued. This position is too broad to be correct. Buller in his N.P. suggests a query

Private Wrongs

as to it — and Mr have neither to think with him —

The fact on the subject seems to be that the servant is excused in both cases only, when the property came not to the hands of the master or servant tortiously — and in cases whenever trespass vi et armis is concurrent with trover, there if the servant commit the trover tho' by the command of his master ~~and under the same circumstances~~ he shall be liable if the command of his master under the same circumstances would not excuse if perhaps vi et armis had been brought —

If the Property of a feme sole be taken or found before coverture but not converted until after marriage, the husband may join his wife in an action for it if he chuse or he may bring the action in his own name merely — As to this point however much contrariety of opinion exists — Mr Gould thinks that the wife ought not to be joined — because as until a conversion no action will lie to recover the property, it cannot be called a chose in action, and as it is not a chose in action the whole must pass to the husband by the intermarriage —

The Pltff. is required to do no more than to prove his possession until or unless the Deft. proceed to disprove the Pltff's property for the possession itself was only primâ facie evidence of property. But if the Deft. admit their presumption the Pltff must support it by proof that he had a property in the thing —

Private Wrongs

An Executor may bring trover against an Executor de son tort for goods & property which as Executor he has been possessed of — Nor can such Executor de son tort make any sound defence but if he had paid out such property for debts, this matter would go in mitigation of damages —

Trespass vi et armis —

So far as relates to injuries to the person of the Pltff. as for assault battery &c. &c. this action has already been treated of —

But we are now to treat of it as it relates to injuries done to the personal goods and chattels of the Pltff. —

This action will lie in all cases where the Deft. has taken the personal goods of the Pltff. and is therefore a more extensive remedy —

It is laid down that whoever has the possession of the thing on which the act was done may bring the action of trespass vi et armis. But this is not an accurate mode of viewing the subject — It is indeed an action for an injury done to the possession and sometimes to the possession independent of the property. As in the case of a naked bailee the principle in this action in case is that a naked bailee cannot maintain this action unless he be liable to the bailor for the property but

F.H.N.B.

2 Roll. 257—

8 Co. 146 ——

Private Wrongs.

There are many cases put by Bacon where in trespass will lie which seem rather subversive of the principles of charity or courtesy as where there mere kindness one man intermeddles with the property of another merely in order to preserve it, and out of mere good will. But for a long time no cases of this description appear in the books, and Mr Reeve apprehends that they would not be considered as law at the present day and Comyns (who is a good authority says Ld Kenyon as a decided case) expressly denies them to be law now & that a man may for such purposes intermeddle with his neighbour's property.

Trover as has been remarked will lie against the finder of a tortious-taker; but not so of trespass which if brought must be brought against the first taker.

Trespass will not lie against a sheriff who accepts bail, for not taking sufficient bail when tendered; for this is a mere non feasance. But in such case trespass on the case will lie. But this rule in Com. Pl. is neglected, where trespass vi et armis will lie.

Trespass vi et armis will not lie for consequential damages. A person may do such an act (unlikely enough a lawful act) as will materially injure an other, and which notwithstanding will support a action of trespass vi et armis.

As if a man turn water by a spout from his house.

Stra. 604. & 2d
Bay. 1399 ——

Mood 083. ——
2 Roll. 797.
see ante —

2 Roll. 566.
4 Co. 88 ——

upon his neighbour's to his great damage: Or or if he overflow his neighbours land by turning a water course upon it—

Trespass vi et armis does not lie in such cases because the injury does not immediately proceed from the very act of putting up a spout, or digging a canal and these abstractly considered, being done on the Defts own premises are not unlawful but become so by the consequential injury for

A Trespass which amounts to a theft cannot it is said be sued for as a trespass — because of the merger — But as the reason of this rule has ceased so ought the rule —

A man may drive off his cattle from his fields with a dog not subject or capable to do great injury, suffering the cattle to go out in any direction that they will, and the owner or curator of the field shall not be liable for any thing which should befall them — But it is to be remarked that the owner may not chase them with a fierce ou[illegible] ferocious dog or a bull dog — nor is he allowed to turn out the cattle into the highway where they may inevitably get lost, in taking down the bars or fence — But if they being driven jump into the highway it is well for the law will presume that they got out where they got in —

as the Bailee cannot judge precisely under what particular circumstances he will be liable, it is holden that in all cases he may have the action—

No one however is entitled to this action on the ground of his having had the possession of the thing, if under no circumstances he could be made liable to the person who owns the property—

Neither can one who stole goods sustain this action against one who took them from him for the Pltff must have a possession lawfully gained — But yet if the possession was acquired and maintained under a ~~title~~ claim of title the Pltff. tho' eventually found to have been in the wrong and not to have had a legal title may notwithstanding sustain the action—

Where a license is given By Law and that is abused the original license will not shelter the Deft. but he is a trespasser ab initio — As where one enters a tavern wherein there is an implied license for every one to enter and for example call for wine and after some time calls to breakfast and glasses &c. this is a manifest abuse of the license — the Deft. therefore shall be considered a trespasser ab initio

But a non feasance is not such an abuse of the licence as will constitute the Deft. a trespasser ab initio — As if the Deft. after drinking his wine had merely refused

2 Roll 561

2 Roll. 556-

to pay his bill.

There is one case however which is contended opposes the position that a mere nonfeasance will ~~be~~ never be considered such an abuse of a license as to constitute the Deft. trespasser ab initio. — Viz. the case of a sheriff or other officer neglecting to return his writ after having made an arrest — in such case ~~the office~~ nondore tot the officer would be liable — having abused his authority in not returning the writ, which says who opposes this doctrine is a mere nonfeasance —

But Mr Reeve views the sheriff as having been guilty of an actual misfeasance — for without a return of the writ the sheriff has no proof that he had one, the law in such cases being that the record itself shall be the only evidence that there was a writ — If there were no writ the sheriff was of course guilty of a misfeasance — (a)

But a material difference is to be noted between a license given ~~and~~ or implied by the law and one expressly given by the party

(a) If then the issuing of such writ is a fact provable only by the record and as the sheriff can prove no authority except by proving this fact, it will follow that the arrest is a misfeasance —

For where the license is given by the party a subsequent

1 Sev. 90—

4 Mod. 90 1. —

2 Roll 555 — -

Private Wrongs—

abuse of that license will not render the deft. a trespasser ab initio—As when a shepherd to whom is delivered the custody of sheep, kills or takes one the action of trespass vi et armis will not lie because the sheep were delivered to him and he had an express license to take care of them—

But a distinction here prevails, remarks the reason of which Mr. Reeve does not clearly understand to be correct or sound.

Where one has authority to do a particular act or thing and that authority becomes afterwards vacated:— in this case the sheriff in at all events clear if on the face of it, the process be good— If A. procured the judgment by fraudulent practices it were set aside by a summary mode of proceeding then is A. liable in this action— But if for some cause it was vacated by writ of error then A. is not liable—

If an authority is specially given by stat. that an authority must be strictly pursued or as the case might be the person authorized becomes a trespasser— For example— the law authorizes a man to take cattle damage feasant— but directs when distrained notice should be given to the adverse party— This provision must be strictly complied with, therefore altho' the adverse party had notice and altho' he this be a fact which the distrainor can prove, yet as he did not in pursuance of the stat. give notice himself he shall be holden a trespasser

Com.

Cobar. —

Private Wrongs

Trespass on the case

for

injuries to the person or personal property arising ex delicto

This action lies in three classes of cases viz.

I. For wrongs not accompanied with force.

II. For consequential injuries occasioned by acts accompanied with force.

III. For injuries arising from culpable omissions.—

In this view it will appear that the action is treated as of now as arising ex delicto.

I. The action lies for injuries not accompanied with force as for slander — Vexatious lawsuits — Mal practice as a physician. Trover might here lie but that the tort is in this form of action waived —

II. The action lies for a consequential injury resulting from acts accompanied with force. As where P. S. beats my servant per quod servitium amisit, which to me is a ~~gravamen~~ consequential injury —

III. The action lies for wrongs occasioned by culpable omissions: As where some public agent neglects to do his duty whereby P. S. is very much injured —

Private Wrongs—

These actions are generally founded upon the equity of the stat. of West. II (13 ed. I): it was known however in one or two instances at Com. law — previous to this time the only formed actions founded on contract were Debt, Covenant, and account; those on tort were Trespass Replevin Detinue and Deceit—

The action on the case therefore is scarcely known. It would lie however in two or three cases: as in the case of an escape when it would lie in ~~these~~ favor of a sheriff—

In Com. a distinction has obtained between an action of Trespass on the case and an action on the case: the former of which it is holden is founded on tort, the latter on the case, but this distinction is an arbitrary one, not warranted by the Eng. Books —

But between Trespass vi et armis and Trespass sur case there is a material differance—

There exists at the present day strong reasons in Eng. that the line of distinction between these two actions should be strictly adhered to— And altho' all these reasons do not at present exist in Com. yet Wm. Q. considers it highly important that it should be strictly regarded here—

When the action of trespass vi et armis was brought in Eng. the Plff. if he failed was compelled to pay a fine for the public i.e. the King—

But when trespass on the case was brought there

6 Burn. 126. 2
Wood. 31. Cruche.
141. 196 5 Bac.
196. 4 Bac. 11-
2 Bac. 6 a 6—

was no fine for the King but merely an amercement pro falso clamore suo — which in case the Deft. prevailed went to the Deft. — And altho' both these species of fine and amercements are in fact disused, yet the judgment still continues the same with them and unless the form be adhered judgment will even be arrested in Eng.

Within a few years past however a stat. has been enacted abolishing in a degree the distinction between judgments when formerly there must have been a capiatur pro fine or an amercement.

But however this statute may affect the form of the judgment it may not be material as to this question: for whenever these actions prevail the rule obtains; viz. that actions on the case principles of equity rule as to the recovery or quantum of damages; whereas in trespass vi et armis great strictness and technical nicety are thought essential to be adhered to —

And again it is necessary to keep up the distinction on account of the great confusion which would inevitably result from their confounding actions —

It is material therefore to mark the line of distinction between Trespass vi et armis and Trespass on case

All injuries accompanied with force and which are immediately injurious to the Pltf. are the subjects of Trespass vi et armis —

3 Blac. 208. 9.
J. R. 467. 2. Blac.
R. 3. 9. 892.
2 Lum. 231. —
3 Bra. 634. 2 —
Blac. R. 6. 1055.
2 Lum 648. 6
unc. 125 — —

Private Wrongs.

But altho' the original act producing the injury was accom=panied with force, still trespass on the case may be brought in many cases: the converse of the former rule being true, viz. that when the injury produced by the forcable act be merely conse=quential and not the immediate effect of the force, trespass on the case will lie—

As if D. S. had thrown a log into the street, if the log while still influenced by the throw hit T. N., the action will be trespass vi et armis for the injury is the immediate con==sequence of the force—

But if after the log was at rest in the street, T. N. should fall over it and hurt his shin, if he would sue D. S. for having left ~~it there~~ the log there he must bring trespass on case for the reasons above given—

By this rule all the cases are governed; it is how=ever extremely difficult to draw it nicely always—

The instance of a man's suing one who beat his servant whereby he lost the use of his servant is a good case to exem=plify the rule— the act was committed with force it was directly and immediately prejudicial to the servant and there=fore he shall have trespass vi et armis— But to the master it is only consequential viz. the eventual loss of service—

But what is the meaning of the term immediately

Private Wrongs

then Trespass vi et armis would not lie against the first actor, but if any action would lie Trespass on the case is the proper one —

But the person giving the first impetus is still liable in Trespass vi et armis, altho' some person does give it another direction to the instrument of mischief, if the person did not do it voluntarily the original force will be supposed still to be in operation — as in the celebrated squib case reported by Burrow. When the Deft. threw a squib upon the stall of a meat seller in the market — in this case in order to preserve himself the vendor of meat kicked it off onto an other stall and the owner of this onto an other and so on until in the event it went off and put out the eye of the Plaintiff — The Deft. who had first put the squib in motion was sued in trespass vi et armis and it was holden that it was in

Whenever therefore an instrument of mischief is put in motion, the person doing it will be liable so long as its original force continues unless some rational agent gives the instrument a new direction: & in this case the agent must have acted voluntarily and without being compelled by his own particular situation when therefore the squib was thrown among a crowd each person was situated by necessity to keep it from himself and therefore could not be considered as a voluntary agent, it may be compared to the case of the bounding of the foot ball —

So also it is good law that if one let loose a mad ox

2 Wils. 174. Stra.
638. 7 Esp. 68.

1 Vent. 295.
2 Lev. 72

Private Wrongs.

he shall be liable in trespass vi et armis for the injuries which he may depend or have set in motion an instrument of mischief; and on this ground the case may be distinguished from that of digging a ditch where in a neighbour land was overflowed & that preventing a recovery for in these cases Trespass on the case is the only action.

Thus a man rode into another man's field and his horse ran away from him and did injure the action of trespass on the case was brought and a recovery had because the act of taking the horse there was wilful; that trespass vi et armis would not in that case because the act of the horse "going into the crowd was not a wanton or voluntary act in the rider but one which he could not control" yet Chief Justice De Gray speaking of this case supposes it to be trespass vi et armis and said it was properly decided. — The action on the case brought was certainly trespass on the case and as such was properly decided —

But when the person is literally the agent it matters not in fact whether the act really concurs with his will or not, if the act be attended with force: this being for the purpose of an action against the Master —

When however the person is a agent only by implication of law the will must concur — as in ~~case~~ the case of a master who expressly commands his servant or animal to do the forcible act which produces the injury — there Trespass

o Dicm. 125. —
i H. Bl. 54 2 —
or 442. Salk.
f 4. Dicm. 229
ctr a. 1283. 4.
Dun. 2093 —

+ Dicm — — —

Private Wrongs

vi et armis lies against the master, for his will expressly concurs with the act —

But if a servant does an act attended by force and followed by injury; but without an express command, the master is not liable in Trespass vi et armis — But as every man is obliged to have none but diligent servants, he shall for this act be liable in Trespass on the case; and as he did not expressly command his servant to do the very act tho' by implication of law his servant is his agent, but this implied agency will not subject him —

When therefore a servant ~~therefore~~ being in the pursuit of his master's business, without an express ~~to~~ command ~~to do~~ does a lawfull or unwarrantable act, whereby an immediate injury results to the Pltff. Trespass vi et armis will lie against the servant or Trespass on the case against the master — For the master should not have employed so negligent a servant — and the same may be said of a dog which is proved to do mischief, trespass on the case will lie against the owner for letting him run, if a special damage or injury results. And in particular circumstances trespass vi et armis would also lie; as if he had notice that he was used to bite people, and notwithstanding he set him up, for the thing would be done wilfully and equivalent to a command)

If A. wilfully steer his vessel against B's and injure

8 Jun. 183—

Ad. Ry. 917.
1 Pl. Con. 252-
Sno. Eliz. con
-tra - & 19. Ad.
on 20 the 1st cert.
ate of this defen
dant became.

Private Wrongs

result A. is liable in Trespass vi et armis —

But if A. do not take proper care and drive negligently against B's carriage &c he is liable in trespass on the case only; for in the latter case he neither does the injury by striking with his own hand, nor voluntarily or wilfully ~~or~~ directing it to be done, as in the case ~~inadvertently~~ of improperly shaving his vessel against B's. But much by a criminal negligence suffers the act to be done and therefore shall be liable in trespass on the case —

Of the Cases in which Trespass on the case will lie —

It is not meant here to enumerate all the particular cases in which actions on the case would lie this indeed would be impossible — It is only meant to mention such classes of cases wherein there is an injury to the person or to the personal property which are not to be found under the latter —

The action will lie in cases of a criminal neglect on the ground of delictum — But in these cases the neglect must be of a duty imposed by law: — not of one which is founded in contract merely — Thus the law imposes upon the finder of goods an obligation to keep with care and ordinary diligence but if he do not whereby the goods are lost or injured this action will lie —

1 Com. 206. 7
1 Roll. 98. 2 —
Bac. 366 —
Salk. 328 —

Young. 42 —
2 B

2 d. Ry. 214. —
2 Wilr. 359 —
Esp. D. 601 —

3 Blac. 122. 166
Esp D. 601. Com.
165 —

Private Wrongs.

So any officer in the law is liable in all cases where damage has issued from a criminal neglect of his duty as an officer. Thus a sheriff is liable to the Pltff. of a writ, if he neglect to return the writ.

Attempts have been made to draw a distinction between the case of a sheriff employing a deputy and other cases. But has been decided that sheriffs like other masters or principals are liable civiliter for the acts of his servant the Deputy.

Indeed the rule is almost universal that any one who undertakes to do business for an other in the line of his profession may render himself liable to this action.

But if the business undertaken be not of the profession of the Deft. he shall not be liable for want of skill merely, unless there be an express agreement to do the work well. But for negligence Deft shall in all cases be liable.

For example if a cooper agree with P. P. to make him a cask. Now a cooper cannot be supposed to understand the mode of making casks, and as there was no special agreement to make it well, the cooper can not by any marks of want of skill subject himself to this action. But for great negligence he shall be liable.

In the profession of physic or surgery a practitioner shall not be liable even for ~~neglect~~ negligence, provided ~~the~~ physic or surgery (as the case may be) be not his professional

Com 166. 170.
9 Co. 52. 1 Roll.
90. 95. 3 Bl.
166 ——— ———

Disp. D. 606. Cro.
J. 350. 1 Com.
D 208. Salk. 662.
3 Salk. 12.
Ld. Ry. 109 —

Private Wrongs—

business:— ~~of~~ or if he does not expressly agree that he will perform without negligence—

This rule is founded rather in policy than in reason—

And in general this action lies against any one by whose act the health of the Pltff. is injured as against a seller of bad wines— But queere how upon principle can a seller of bad wines be liable unless he knows the wine to be bad—? ~~for~~ but such is the law— Blackstone says he is liable because there is always an implied contract or warranty that provisions sold are good—

This action of warranty is treated as arising ex delicto— but it arises or would seem to arise in this as in some other cases ex contractu.

This rule as laid down by Blac. seem to be founded in reason, but is not to be met with in terms in any other of the Eng. books—

But in every other case except in the implied warranty of ownership when one sells a thing the maxim Caveat Emtor applies— the exceptions which obtain— in the case of the sale of provisions for in these cases a neglect cannot well be imputed to the vendee—

This action of Trespass on the case lies also where the owners animal being addicted to bite goes, to other injuries of the like sort does an injury to another— But in this case there

1 Com. 208.
4 Co. 18. b.
1 Roll. 4 —

Ld. Ry. 606.
1 Com. 208.
Cro. Ch. 234 —

9 Co. 112. Esp.
845. 1 Vent.
275 — 2 Vent.
186 —
Stra. 5 - 638.

there must have been sufficient notice given to the owner that his animal was addicted to such kind of injuries as that sued for. — But if the owner have notice of the species of injury done it is sufficient —

It is laid down in the books that a scienter is not traversable. The rule thus laid down is apt to mislead it does means merely that the scienter cannot be traversed by plea but it may be disproved under the general issue — It may surely be denied under the General issue for it is the very gist of the action. But the rule is that by a traverse or plea it cannot be.

But if the injury was done by animals feræ naturæ no notice to the owner is necessary for the presumption of law is that the owner of an animal feræ naturæ must have known as a matter of course that the animal was addicted to doing injury —

Trespass on the case also lies ~~on the~~ for a disturbance i.e. the interruption of the free enjoyment of one's right —

This right may be in something corporeal or something incorporeal as for instance a right of Common —

So that the diverting of a water course may more properly be called a disturbance than a nuisance —

This action lies also for an escape against a sheriff or other officer whether the arrest was on mesne ~~or~~ or final process

2 Bac. 245. —
1 Show. 175 —
Cro. Eliz. 17 —
2 Stra. 873 —
2 Mac. & H. 148.
2 Burn. 126 —

Private Wrongs.

And this case is almost the one by one where in this action would lie at Com. law i.e. before the statute of West. 2d.

That this action would lie at Com. law appears evident from this circumstance viz. that there was no formed action which would apply. An amercement by which the Pltff. would have been recompensed applied only where the sheriff had returned a Cepi Corpus.

But the stat. I. Rich. II. gave likewise the action of Debt vs the sheriff if the arrest were on final process.

Then for this purpose the action of Debt is brought the whole amount of the judgment recovered against the escapee must now be recovered against the sheriff. And altho' by the more modern doctrine, less than sued for may in general be recovered yet in this case the old rule is adhered to and the former judgment must be the rule of damages.

But if the Pltff. prefer to bring an action on the case the jury in their discretion may may give more or less or the same sum or nothing.

A stat. in Com. has obliged the jury tho the action were case (the escape being voluntary) to give in damages the whole amount of the former judgment.

As to the subject of the liability of officers a dis=

Eno. Ch. 141. 196.
2 Wilk 318, —
2 Mod. 31. 8
Co. 146. 6 ——

Private Wrongs.

=tinction is to be taken between process —

If the process be merely void on the face of it, then the sheriff shall not be liable to the Plff. for the escape —

But if the process be merely erroneous the sheriff or other officer shall be liable to the full amount of the judgment recovered in debt, or if the arrest be on mesne process or upon final process ~~the~~ trespass on the case be brought, the damages will be at the discretion of the ~~court~~ jury — The reason of this is that an erroneous process is considered good to all intents and purposes untill regularly impeached and set aside in the proper way untill then debt will lie — for it can not be impeached but in a collateral action —

Trespass on the case in case of ~~mesne~~ Bailiff whether the arrest be on mesne or final process —

But the law is not the same in case of a rescue on mesne process as if the rescue were on final process —

I. If the Rescue were on mesne process the original Plff may sue the ~~Plff~~ rescuers. But he could not as Plff. in this case sue the sheriff.

If the escape were on mesne process the sheriff (provided he did not collude) has been guilty of no breach of duty — he may return a defence and the return will be good because in arrest on mesne process the sheriff is not supposed to have the posse comitatus with him. And Query whether the sheriff may sue the Rescuers

Bull. N. P. 62.
6 Mod. 211 —
Rob. B. C. Com
77. Salk. 311 —

Moth. 77. n.
109. 5 Co. 4 b.
4 Bac. 399 —

Private Wrongs.

In this action then brought by the original Pltff. against the original rescuers — the jury are not confined in giving damages, to the sum originally sued for but may according to the circumstances give more or less than the original debt sued for.

In order to reduce the damages below the sum originally sued for, the Rescuers may prove the original ~~debt sued for~~ Deft. solvent and able to pay any thing — or they may show that he is now within the reach of process and may easily be taken again — But if they do not make out facts like these ~~the~~ Jury will probably give the whole of the debt —

It follows then of course as a good rule of practice that the Pltff. prove or be prepared to prove that the original ~~Pltff.~~ Deft. is not able to pay him, or is not within the reach of process. This is an expedient rule of practice - but not ~~necessarily~~ necessary absolutely in order to procure a recovery —

Trespass vi et armis is not in this case the proper action to be brought by the original Pltff. against the rescuers but ~~trespass vi et armis~~ trespass on the case and not as might be supposed trespass vi et armis.

III. If the rescue be on final process, either the original Pltff. or the Sheriff may maintain an action —

The sheriff may sue because in case of an arrest on final process a return of a rescue is not a good return for he is

Dep. 610.

Dep. 610—

Cro. El. 59.
Dep. 610. 615—

rendered liable to the original party, he is subjected to their action in behalf of the sheriff. *

But if the gaoler or under sheriff voluntarily suffers the escape, query if the high sheriff could sue the escaper altho' in such case he is surely liable to the original pltff.?

But the under sheriff cannot in any case bring suit against the escaper, in his own name and character as deputy sheriff — even after he has paid over the debt to the Pltff. or sheriff. The law does not recognize a deputy sheriff as such but he is liable over to the sheriff merely on the ground of contract and not because the law recognizes such a relationship or because the law will imply a contract between them —

But for a voluntary escape the under sheriff as well as the high sheriff is liable to the original Pltff.

In Con. the under sheriff may probably sue the escaper; so much force would not probably be given to the idea that he was particeps criminis.

However the under sheriff in Eng. may sue in the high sheriff's name which is the usual course — unless the high sheriff had already sued the under sheriff or escaper: for in case he had thus sued the deputy sheriff — his name could not again be made use of or Pltff. in any other suit for

Esp. D. 617. 2.
Wms. 325. —
Salk. 364 —
Burr. 266 —

Stut. 125. 3 —
Wms. 377 —

1 Lev. 228 —

the same thing.

Attorneys are also liable in this action for neglect or mis-management or misconduct.

But for mere ignorance or want of skill in managing a case an attorney is not liable — Altho' for negligence it is confessed that for negligence he is liable.

But why it may be asked is there a difference between this and cases of other professional characters? We can conceive of no ~~reason~~ other reason than that which arises from the intricacy and glorious uncertainty of the law — for if the ablest judges mistake the rule it is not to be expected that an attorney would be always correct.

Attorneys may also make themselves liable in this action even to the overseers of his client for his fraud or dishonorable practice — As where an attorney procured an erasure of a nonpros whereupon he took out judgment for his client; here the attorney was holden liable to the person against whom he procured judgment to be taken and as the attorney had been guilty of malpractice — the rule applied that he should not take advantage of the law in a case wherein he had broken it hence he could not recover back the money from his client.

Trespass on the case or the case will also lie against

1 Raw. 90. 1.
Hale 97—

2 Co. Ry. 909.
Co. Litt. 89.

a Justice of the peace or other magistrate or minister of the law for a neglect of duty — for refusing to do that which the law requires of him in his public capacity to do provided the individual the Pltf. be damnified or injured by such neglect. Or if the Justice was not to accept of good bail when tendered — to sign or acknowledge a deed when required of him — Or if a recorder of deeds were to refuse to record one when required to do so — whereby the Pltf. was damnified.

But the action will not lie against a Judge for a neglect of this sort unless the act required of him was a ministerial one. —

A Judicial act as contrasted with a Ministerial act consists in hearing, judging and determining — And as all ministerial acts require some exercise of Judgment yet they are easily distinguishable from Judicial ones if this ~~defin~~ definition be kept in view — Thus a Judge may have in his own mind doubts whether he ought to take ~~certain bail or not~~ bail in a certain case, yet this is much a ministerial act in him as it is in the sheriff and he decides at his peril —

Trespass on the case lies also for a breach of trust in a bailee: indeed it lies in all cases of bailment when property is injured for the want of that degree of care and diligence which the law requires of bailees — And in these cases it is

7 Co. 83. Salk. 26.
Esp. D. 618 —

3 Salk. 303 —
1 Salk. 440 —
Dum. 651 —
Esp. 623 —

Salk. 17. Cowp.
754. Esp. 624.

founded in negligence and ex delicto and not ex contractu.

It will lie for example against the owners or master of a vessel for goods lost thro' their negligence or that of their mariners. It may for their purpose be brought against any one or number of the owners, or against the master alone for goods lost or injured in this manner, this is now well settled tho' it was formerly otherwise and it is now settled of course that the action in this instance does not arise ex quasi contractu.

Yet a post master is not liable for letters — drafts — bills — notes or money lost thro' the negligence of the sub-agents — both because as Ld. Holt says this establishment is for carrying news and not for ~~carrying letters or any things~~ carrying letters or other things — And because all the post masters collective lives might not be able in respect to their pecuniary circumstances; And again because there is no contract express or implied between the post master and the person who sends his money or letters in the mail — A post master is the agent of the government; he receives no compensation from ~~government~~ such individual but from government.

But if the post master commit a fault himself or is guilty of a negligence he shall be liable in this action as if he neglected, or refused to make provision for sending a letter which is put into the mail — for in this case the law has

3 Mla. 443 —

Comp. 765.

2 Co. 82. Bul.
n. 2. 73. Ev.
2 Co. Jos. 178
Jo. Boi. 195.

Moor, 7 B. & C.
9. 5 Dum. 273.

been made it his duty to forward it; and if he neglect to perform that which is by law required to be performed, whereby an individual is injured he shall pay the damage —

But even in this instance his liability does not proceed on the ground of contract —

Innkeepers are liable for the ~~loss~~ loss of any property left in the inn to their charge — if the loss be owing to the want of that care which they ought to take. And tho' the goods be stolen by a stranger still is the Innkeeper bailee —

In many respects they are as bailees of such property. But on this subject the following distinctions are to be remarked — to wit —

If the theft were committed or the injury or loss sustained by the means of the Guest's servant or companion or by the public enemies then the Innkeeper is not liable —

And in order to subject the Innkeeper as such to this action, the owner of the goods must have been a traveller and received as a guest: for if a neighbour call at an Inn and happen to lodge all the night the Innkeeper shall not be liable for such loss or injury of his goods —

But queere whether a traveller under such ~~circum~~ circumstances can testify as to the quantity or value of the goods other lost?

Eno. J. 188. g.

Salk. 388.

Eno. J. 189.
Dispr. 628 —

Private Wrongs.

But again, an Innkeeper is not liable ~~gone out~~ unless he receive some profit from the guest or his goods as a depositary however he shall be liable for when the rule says an Innkeeper shall not be liable it means that as innkeeper he shall not be. But surely as a depositary or naked bailee he must be liable.

But if a person not a guest leave goods at an inn or if having been a guest he goes off and no longer continues to be one he shall not charge the innkeeper as such for this. Unless the goods be of such a nature as that the innkeeper derives some profit from the custody of them. If for example they consist of a trunk portmanteau & with the property contained in them the Innkeeper cannot be said to derive any benefit from the keeping. But if a horse were left in ~~the custody~~ his custody, for the stabling and food of which the innkeeper receives a profit, he shall be chargeable in the same manner as if the owner had been or had continued to be a guest.

Or the Innkeeper is chargeable on the ground of the profit which he derives from his guest or goods -- Where there is no profit to the Innkeeper there shall be no charge.

Therefore if a guest comes to an inn and departs leaving his goods, telling the Innkeeper that he shall be back

Co. El. 622.
Exp ——

8 Co. 33. 6 —

2 Show. 327.
2 Bl. 166. 9
Co. 87. Dyer
158. Bul. n.
p. 90 ——

in a few days and during his absence his goods be lost the Innkeeper shall not be charged for he has no profit or gain from the keeping of such ~~goods~~ dead goods —

But mere temporary absence will not remove this liability of the innkeeper — As if the guest go out in the morning & return at night, a damage having happened to his goods in the intermediate time, the liability of the innkeeper still continues.

Sickness or non sane memory is no excuse to an innkeeper where he is sued on such an occasion — In this respect therefore he differs from other Bailees — The reason is that it is an act of necessity for people to stop at inns, and the Innkeeper must at his peril provide that proper care be taken of his guests and their goods — and if the landlord be sick his servants must exercise this care — Such a plea as this was therefore declared bad on demurrer —

But the Innkeeper is not liable for any bodily injury done to the person of the guest as a battery false imprisonment &c. The Innkeeper quasi a bailee of the goods; but not of the person —

Trespass on the case lies against an innkeeper for refusing to take in a guest unless he assign some good reason for refusing him — as that his wife or servant was

Sattle. Q.H. Cno.
J. 4 — Yates. 20.
Wall q.q.l Com
100. £ —

Ad. Rep. 118. 1 —
Fond. Pic. —
French. Low a.g.
3 Mar. 105 —

rich &c — for an innkeeper is not allowed from mere caprice to remove, or because he dont like the phiz. of his guest to exclude him, and to refuse to give them admission is a breach of an implied contract which Innkeepers are holden to have made with all travellers.

This action also lies for deceit in the sale of ~~the~~ property, as in cases of false warrants &c —

But when there is an express warranty the action sures to Mr G as in fact founded on contract — It is however a sort of a mixed thing and is declared upon as a sort of fraud —

In cases of false affirmation, there must have been a knowledge of its falsity — But in cases of warranty no knowledge of the warrantor is necessary —

It does not however lie against the vendor for this false warranty or false affirmation if the vendee has been guilty of any negligence — for caveat emtor — If therefore the vendor warrant that the horse has two eyes when in fact he has but one, the warranty will avail nothing unless the horse sold was absent and without the vendee of inspection, or unless the vendee were by reason of his peculiar situation incapacitated to discover the defect, as if he were blind.

So if I say to A, to whom I am about to sell a hor-

3 Blac. 165

3 Salk. 211

2 Vall Rep.
Esp. 682

Private Wrongs

"B will give me $200 for him" the warranty or false affirmation shall avail nothing, for A. may examine of B. himself: and cavet emptor.

The general rule is that the vendee must look to all visable defects himself —

But if the horse have a wind gall or tumour upon any part of him and the vendor say "he will do as much service as if that tumor was not there" the vendor will be liable in this action, if it be found that he would not —

There is a decission in Salk that where the jury had given a verdict for the Pltf: on a general warranty ~~wh~~ whereby the warrantor had engaged that the horse was sound & and he proved to have but one eye out of which he could see, the verdict was good — for it should be intended that the defect was such as was visable without the exercise of skill — And this judgment was not meant to vary the rule —

Trespass on the case lies against a vendor for an artful concealing or concealment of a defect in the thing sold which is a kind of fraud. —

The courts of Com. have decided that when a vendee ~~[illegible]~~ delivers a sound price for a thing it shall be presumed even contrary to evidence that a warranty was implied —

This if applied merely to the sale of provisions

Eno. 9. 474. 1
Show. 63. 68.
Salk. 210. 1 Term.
109. 373 Carth.
90. Ld. Ky. 590.

might be agreeable to English principles; but if extended to ~~all manner of sales~~ the case of all manner of sales as is contended by ~~some~~ some it surely cannot be —

But upon Eng. principles ~~also~~, there is also another exception to the rules laid down above respecting warranties &c: viz. in the case of goods purchased of a merchant - for here there is always an implied warranty that the goods are ~~war~~ merchantable —

In all sales of personal property also there is an implied warranty that the thing sold is the property of the vendor.

But a rule is laid down that if the vendor falsely affirm the title to be in ~~him~~ him; the action will lie not lie unless there be a scienter in the false affirmation —

This proposition Mr. C. cannot acknowledge as good law — It must in truth be intended to have been restricted to the action founded on fraud In such case therefore Mr. C. apprehends the law to be that without ~~which~~ a scienter the vendor is not liable in fraud but is liable on the implied warranty that the property was his own — And possession in ~~sale~~ sales of personal property is always sufficient evidence of property to ~~give~~ this warranty —

So this action lies for any false affirmation made for the purpose of defrauding another altho' the person

3 Durn. 51.
Pooley vs Freeman
5 D
1 Esp. 167 —

Esp 693. Cro.
Eliz. 90. Bul.
ni. pri. 32. —
1 Lev. 247 —

Cro. El. 90.

5 Co. 72.

Salk. 19. 3 Salk.
17. Esp. D 647.

Private Wrongs.

making it had no ~~intent~~ interest in the transactions or in knowing the fraud. This principle however has been settled but very recently; for it was before thought, that in order to maintain the action against such person he must have had some interest to be effected by it.

Trespass on the case lies also for an injury by cheating or false pretentions — as if one should assume the name of another and thus by false pretences receive money which was due to the person he pretended to be.

So for cheating a person with false cards or dice of a sum of money this action will lie.

Whenever public right is violated or obstructed to the injury of an individual he may have the action of trespass on the case and shall recover the special damages which he might have received. But in such case the Plff. must particularly state his special damages and indeed this is usually required in this action.

This action also lies in a vast variety of other cases not enumerated. As for a legal voter if he offer his vote in the regular mode to the proper officer and such officer refuse to accept the vote. In this case the voter may sue in trespass case and will recover.

So a candidate for an elective office may sue in the

Salk 502.
3 Mod 45. 49.

1 Wils. 122.
Dyer. ~~47~~ 647.

Bac. Ab. pr. 62.
3 Bla. Ab. Dyer
D. 648

action against an officer for refusing such vote or for making a false return to the damage or prejudice of such candidate —

But it has been determined in Eng. that such candidate cannot bring this action until the question is previously determined by parliament that the return is a wrongful one, if the office voted for be a seat there for say they the parliament alone shall be a judge as to these matters, Unless such question cannot be so determined as if there be a dissolution —

But this decision has been very strongly and very properly opposed Ld. Holt says that he will always try such a question and maintain the action which ever way the commons may decide —

This is clearly upon principle a violation of private right and therefore the court ought and are bound to decide upon it — and this even after a determination of the commons —

A further remedy is now given by stat 7 & 8. Wm. 3. viz. where the returning officer has made a false return the person who should have been returned shall recover double damages and costs of such officer —

This action will also lie ~~to hear~~ against an officer of a corporation, or other inferior court of justice for making a

4 Burr. 303.

2 Ld. Ray. 739.
Salk. 441. Stra.
1083 ——

Eno. Eliz. 908.
5 Co. 98. a —

Gilb. R. 196 —
1 Burr. 541 —

false return to a mandamus.

So at com. law an author may have their action against any one who may publish his work without his assent — And now the action would probably be founded upon the equity of the stat. of Vict. 8. — And in the U. States it would be founded on a stat. enacted by Congress —

And query whether a professed abridgment of the work would not fall under the provision of the ~~rule~~ law?

So also in this action any one who employs another in his service is liable for his acts as agent or servant —

If an officer of the law qualified to serve process be prevented by a stranger, as if the stranger conceal or carry off the goods or person upon which the process was to have been served — or as if such stranger should forcibly the door of the house into which the officer would have entered, & for this obstruct process this action will lie —

In DECLARING in this action no precise form is required as in the ~~specified~~ ~~specific~~ specifically formed actions —

For this purpose however see the titles, Pleas and pleadings and the pleadings in Trespass vi et armis and the other actions treated of —

I. Mandamus.

Salk. 429. 1 —
Vern. 176. 3.
Bac. 560. 4
Mod. 282 or
132. 3 Burr.
1267 —

3 Bac. 527.
4 Mod. 281.
3 Burr. 1267.

1 Co. 93. 3 Bac.
529 —

Private Wrongs.

There still remain to be treated of, certain species of private wrongs, which none of the actions hitherto will of themselves completely redress.

We shall therefore in the next place treat of the three prerogative writs which are ~~calculated~~ calculated in such cases to prevent a failure of justice. These are the writs of Mandamus of Prohibition and of Habeas corpus.

The writ of mandamus is a prerogative writ issuing from the court of Kings Bench in Eng. and answers in some degree to a bill in Cha. or its effect is some what similar.

It would seem also that a court of Ch. has ~~although~~ a right to issue their writ. but it is a right long since disused & it now issues almost only from the B.R.

The object of this writ is to invest with or restore the party to some right of which he has been deprived or excluded. It is granted in those cases only which relate to government ~~of~~ or to the public. And only in these cases where without it there would be a failure of justice.

If the applicant prevail he is again restored or he is admitted to some corporate or other franchise which as it is said must ~~come~~ concern the public ~~of~~ and of which he is deprived or kept out by some ~~by some~~ public officer.

This writ therefore never in fact issues in case

5 Bac 728.

Stra. 109.

J. Rd. 481.
1 Dio. 14 —

Private Wrongs.

of a mere private right and wherein an injurious individual is commanded to do an act (in his individual capacity) commanded to do an act: but it lies merely to compel the performance of the official or corporate duty: as against a corporation — inferior court — or public officer.

A corporation may be said to regard the government because it ultimately concerns the administration of the public police or is effected by the charter from the King or supreme power of the state.

This writ is one of mandamus of common right by any individual and the court is not authorized to impose any terms or conditions upon the party applying, as in analogy to the power in granting new trials and in other cases where the court has a discretionary power.

A mandamus, as has been observed will lie against public officers — corporations & inferior justices.

But if a meeting of the members of a corporation may be compelled — or an election of their officers may be compelled &c — and if an officer should refuse to perform the duties imposed upon him by the laws of the corporation this writ lies to compel him to perform it.

It lies to enforce the admission or restoration of a person entitled to a corporate office when theft out of it — Writ

4 Burr. 1999
Prop. 176 —

2 Bac. 534.
Carth. 457.
2 Ld Raym.
1183. 552. Salk.
299. 2 Ld Raym.
879. Raym. 669.

1 Ro. 94. 2 Bur
172. 1 Vent.
143. 153. 4 2
153. T. Ro. 1.
Salk. 175 +
x 9

x Sup.

1 Vent. 11, 1 Roll
459. ~~Raym.~~
1 Lev. 75.

the members of the corporation would not suffer the officer to act or refuse to give such person the warrant or commission of his election — which may happen in the case of the election of a town clerk, or select man —

It issues to compel persons in authority to do their duty as to compel a court of Probate to grant letters of administration.

It will issue to a clerk of a corporation to him to deliver over the books the papers and records of the office, to his successor.

It is not settled by any determinate rule what offices do concern the public —

But it would seem that every officer of the law properly so called holds an office which concerns the public —

Every officer is an officer of the law, but such as are appointed and constituted by some private association; as where a number of gentlemen unite in an association for a circulating library, for with such in a corporate society the law has nothing to do. The clerk therefore of such an association is not a subject of this writ —

Agreeably to the foregoing rules it appears that the writ will lie to restore an attorney to his office as such — when improperly expelled or kept out by the court below —

But this writ will not lie to restore or admit a person to an office unless that office be of a certain permanent

1 Vlz. 11. 1 Dan=
n 931. 4 Dunc.
125 ——

1 Dunc. 146.

greene

1 Lid 401 Vent.
143. Dep. 666.

=ment nature—

Hence it is, ~~that~~ that an office appointed by a voluntary sub=
=scription cannot be a subject of the writ—

This rule however means no more than that the writ will not issue unless the office be endowed or recognized by law as in the instance above put of the office of a clerk to a circu=
=lating library or elsewhere of the members are not incorpora=
=ted by law—

For by a permanent office is by no means a freehold office — and We could see no reason why the writ may not in all cases issue, whatever be the length of time for which the offices be appointed, if they be appointed under the au=
=thority of the law and agreeable to its provisions—

+ It will lie against a town treasurer to compel him to pay over money to a creditor of a town — It will issue against justices to compel them (the law being such) to lay a town tax against the retired men to compel them to make provision for the poor —

But the stewardship of a court baron has been holden to be of a private nature, for the court ~~baron~~ baron has been holden to be an institution of a private nature—

It never issues against a magistrate or officer to command an act to be done if it be uncertain and unde=

1 Wilk. 260.

Doug. 506.
exp. 156.

2 Stra. 881.
2 Bac. Ab. 708.

Salk. 458. Bul
n. pri. 200.

Private Wrongs.

=termined whether it be his duty to do it such magistrate or officer has a right to do the act, or if it be undetermined whether it be his duty to do it — But when the question is determined the writ may of course issue —

It never issues except to prevent a failure of justice: for wherever there is an other legal or equitable remedy which shall be adequate to the injury done, the writ will not issue As where the cashier of an incorporated bank refuses to convey to an individual member his bank stock; Here such person may bring trespass on the case against him and recover adequate damages — or if he prefer he may file a bill in Ch. and compel the specific transfer —

It never issues if the thing which the complaintant wishes to ~~would~~ have done, be directionary in the person against whom the Pltff. would have the writ issue —

If several persons apparently under the same circumstances be kept out or prevented the enjoyment of offices, they must have several writs, for they may be vested for different reasons; and it is a wrongful act also to each severally —

Of the mode of issuing the writ of Mandamus.

It is not usual for this writ to be granted immedi=

Esp. 669. 3 M.
111. 3 Mar 428.
Bul. n. pr. 199.
200 ———

Esp. 669.

Bul. n. pri.
199 ———

Salk. ~~488~~ 432.
436.

=atety on the first motion made — But a previous motion is first made that the Deft. show cause why a peremptory mandamus should not issue —

Nor is it common for the court to grant even this motion unless the Pltff. bring sufficient affidavits that the facts which he states are true —

But under special circumstances particularity such as require an immediate interposition of the courts the writ will issue instanter — as where those whose duty it might be, as Justices refuse to make out a poor list; whereby those who are entitled are suffering for ~~it~~ want of it —

This writ never issues except where the Deft. has been guilty of a positive omission, or of the commission of a fault for a mandamus is not like some others a preventive rem=edy — And the court will never presume that an officer will omit to do his duty until the fact has actually happ=ened —

It issues against no other than the particular person who has himself been rendered liable, or who may have made default — It will therefore, not issue against a superior who might have ordered the offender to have done the act —

But where the act should have been done by

Salk. 699. 701.
1 Stra. 66

1 Bac. 111.

~~1 Bac. 111.~~

1 Vent 111 Salk.
432

Lil. Ab. 481.
3 Bac. 445.

11 Co. 99. Carth.
171. 172. 3
Bac. 547

an officer of a corporation aggregate the writ may issue against the whole corporation or against that particular part, whose duty it was to do the act.

If as in common cases a rule to show cause be granted and sufficient cause be not shown, the peremptory mandamus issues — at first in the alternative i.e. that the party do the thing required or show sufficient cause why he does not.

If the party return reasons which on the face of them are true the court will according to the com. law proceed no farther tho' in the event the facts alledged be found untrue — for at com. law the facts thus returned were not traversable, but by suing an action on the case against the Deft. for a false return when if the Pltff. prevailed damages would be recovered and a peremptory mandamus also issues.

But by stat. of 9 Ann this return or statement of facts may be traversed when the return is made. Since this stat. the party has two remedies viz. an action on the case for a false return or to traverse the facts alledged and if he succeed to have a peremptory mandamus.

When the truth of the facts alledged in the return are denied a jury must be called to try and determine their truth.

If the writ be directed against several and a false return be made by them, the Pltff may sue them all jointly in

Ld. Ray. 754.
Carth. 172.

Bul. n. p. 201.
Esp 685. 3 Bl.
111.

Salk 430 —
3 Mac 544 —

3 Bl. 111 Salk
429. Ilna.
838.

trespass on the case, or at his election he may sue either of them for the action being founded on tort will lie against any one of them.

But if any one of the defts. to the ~~writ~~ writ had as member of the corporation voted against the false return the action will not lie against him individually — and if the action were brought against all in their corporate capacity no recovery could be had against such individual at the same time if the corporation caused the disposition to be of no effect. for if under such circumstances a false return was made to a peremptory mandamus the jury would not find such individual guilty of having made a false return —

If the party or parties who made the false return be sued in trespass on the case, in the same court out of which issued the mandamus on the rule to show cause and recovery be had a peremptory mandamus will issue but if the suit be commenced in an other & in an inferior court a peremptory mandamus will not issue for the superior will take no notice of the record of the court in loco —

If a person against whom a mandamus issues makes no return, an attachment as for a contempt goes and —

It is laid down in Stra. that in such case all the some of the members of a corporation voted for making a true return and were overruled yet that the attachment for a contempt should go out against all

Co. Lit. 146.
1 Bac. 287 —

3. Blac. 112. 4
Bac 240. 12
Co. 6. 4 Com
487 ——

1 R. W. 176.
Hob. 13. Palm.
53. 523.
1 H. Bl. 476.
12. Co. 58 —

1 P. Wm. 476 —

Private Wrongs.

This seems rather contrariant to the principle of a preceeding rule.

As a contempt, the refusal to make a return is punishable by corporal punishment — as imprisonment or by mulcts.

III. Prohibitions.

The writ of prohibition is also a prerogative writ issuing usually from the King's Bench.

The object of the writ is to prevent an inferior court from deciding ~~from~~ a case not in fact within their jurisdiction; or of which such inferior court can not take cognizance.

But tho' this writ generally issues from the court of King's Bench, yet it may issue from any of the superior courts of West. Hall.

The writ of prohibition issues both against the inferior court and the Pltf. in that inferior court. It is founded on a suggestion that the cause the cause itself or some collateral question which has arisen in it is not within the jurisdiction of the court.

The mode of obtaining this writ is much the same as that of obtaining the mandamus.

And when by the declaration or some other of the record

Salk. 549. Holt.
593. Hale 79.
Ld. Ray. 211.

Holt. 59. T. R.
5-4. 1 Bro. 65.
Salk. 33. Ld.
Ray. 220. 577.
5 86 ———

2 H. Blac 100.

3 Blac. 113.

ceedings it does not appear that the cause itself or the collateral question was without the jurisdiction of the court, this must be shown by affidavits i.e. the facts must be there shown from which it will appear that the court has no jurisdiction —

There is a contrariety in the books as to the question whether the issuing of the writ be a matter which of right any one may require or whether the court at their direction may grant or refuse? The better opinion would seem to be that it is not a thing ex debito justitiae; but that it issues at the direction of the court —

The writ of prohibition generally issues from no other cause than to prevent an inferior court from exercising jurisdiction over the subject matter of the dispute between the parties: But it issues also in cases where where altho' the inferior court have of right jurisdiction over the subject matter, yet a particular mode of proceeding in the case being prescribed by stat: the inferior court refuses to follow that mode. If such will then deviate from the prescribed mode of proceeding inverso ordine — either in the principle or in a collateral matter the writ of prohibition will issue —

As in granting a mandamus so in procuring a prohibition if sufficient cause be not shown on the rule to show to show cause, ~~or and~~ peremptory prohibition issues — Where in the

Some notes —
14th 148. ——
Edw. 3. 44. Eno
Eliz. 17 & 6. Jac.
12 Ch. 4 Mod. —
16 4 ——

court below & is forbidden to hold cognizance of the suit or longer and forbidding the Pltff. also in such suit to prosecute any further — This prohibition is accompanied with ~~both~~ a

which the proceedings in the court below are always taken to the court above where adjudication is had upon the merits —

But if cause be shown and it be doubtful whether such cause be sufficient — and it be a question of difficult solution the court will direct the person applying for the writ to declare in prohibition i.e. to file a declaration against the Pltff. in the suit below — as in a ~~civil~~ civil suit — This declaration is founded upon a fiction not traversable that a prohibition has issued against the Pltff. in the court below from the Deft. and against the inferior court and that this writ notwithstanding the Deft. above had proceeded against him &c —

If upon this trial the Pltff do not succeed the cause shown being found good cause the writ of prohibition will not issue & the Pltff. pays his costs —

But the declaration must count upon the original cause or ground of issuing the writ which the Pltff. urged & not upon any other or new cause — If the Pltff. succeed and the cause shown by the Deft. be found insufficient, nominal damages are given and the writ issues —

3 Bl. 114 —

3 Blac. 114. 4
Com. 517. 7
Bac. 262.
F N B. 40. 4
Ma. 287 —

Moor 579.

4 Bac 262.
Ev. Ch. 559.
403. 1 Vent.
348. 3 Lev 360.

Prerogative Writs.

When the Pltf. in the fictitious suit is beaten a writ of consultation is awarded by which the cause is remitted to the lower court to be there determined —

This writ of consultation is sometimes granted whenever a prohibition has previously issued: viz. where the Pltf. below files a declaration in the name of the Deft. below (i.e. the Pltf. above) and pursuing the suggestion traverses the fact upon which the prohibition is founded —

So also the court on mere motion may of itself do the same and issue a writ of consultation —

A disobedience to the writ of prohibition is punishable as for a contempt —

The commencement of an other suit for the same thing in the same inferior ~~cote~~ court after a prohibition in that very case is also a contempt — And when the party is imprisoned for a contempt the court will not let him out until he has remunerated the Deft. below for all the expence he shall have been put to —

The Con. law on this subject is the same with the Eng. law —

Habeas Corpus —

The third species of prerogative writ, is the

3 Bl. 129. 8 an.

3 Bl. 129. —
Dyer. 177. 29.
9 Bac. 2 —

3 Bl. 129.

3 Blac. 130.
3 Bac. a. 15.

9 Mod. 235.
2 Mod. 298.

3 Bl. 130. —
Salk. 350. —
2 Ved. 906. 12.
Mod. 666. 8.
Blac. 15 —

Private Wrongs.

Habeas corpus of which there are various kinds —

By this ~~writ~~ ~~an~~ one will is one restrained of his liberty may be brought the superior Court —

It issues at the instance of the party confined or of some one who may have a right that he should thus be brought before such a tribunal —

I. The first ~~kind~~ kind of habeas corpus is that of ad respondendum. This writ is for the purpose of removing a person confined into the prison of a superior court, that he may be there charged with another suit —

II. The second kind is the habeas ad satisfaciendum. This writ lies ~~to~~ in order to serve execution upon one confined under the process of an inferior court by a writ of execution issuing upon a judgment rendered in a court above —

III. The third kind is the habeas corpus ad faciendum et recipiendum — This kind lies where one is to be removed by a confinement by process of ~~[illegible]~~ inferior court that the cause may be heard and determined by the court above. The body is removed by this, not now by the writ: and the proceeding by a writ of [illegible] —This species of the habeas corpus is demandable of common right and without any previous motion —

And so soon as this writ issues any further

+ the case of the of hostilities commencing

5 Bac. 13 —

8 Bac. 8. 9 Geo.
5 Y. Comb. 17.
4 B ———

8 Co. 44. 1 Geo
10. 2 Bac.
2. 3 B ———

proceedings which may be had in the court below are <u>coram non judice</u>.

I A rule is laid down in the books that this writ shall not lie if by it a rightful suit be abated in the court below.

The rule is not properly expressed — When the cause is removed into the court above the proceedings in the case begin <u>de novo</u> — The rule alluded to is meant to extend only to such a case as where a feme sole is sued and confined, but after the original suit out gets married. According to the rule of law coverture by marriage, had after the commencement of a suit cannot be pleaded in abatement to that suit, but as the proceedings commence <u>de novo</u> in the court above it might be there pleaded — But this, the rule above laid down proved is against — And with one further restriction the rule is correct — These three kinds of <u>Habeas corpus</u> are not in use in Con. —

IV. The fourth species of <u>Habeas corpus</u> is that of testificandum. This lies when a person wishes to imprisone a prisoner as a witness —

As this writ effects a temporary release of the prisoner from his confinement it was once questioned whether it did not amount to an escape in a sheriff — This idea was deservedly disapprobated and it was fully settled that

1 Wil. 116, 2
Doe. 238. in,
Car. 14. Hob.
202. Blo. 44—

3 Bl. 131.
1 Bur. 531—

1 Bur. 314.

that it did not; provided the prisoner was not allowed any un=
=due privilages, and was duly remanded —

But if unnecessary liberty was given him it will amount amount to an escape in the sheriff — as if he goes=
=bout with his prisoner that he may transact his business or see his friends; — or as if he take a circuitous route neces=
=sly for amusement or other cause —

Besides these four kinds of Habeas corpus there are some others of title are for an account of which see Bacon or other writers — But the most important writ of this kind is

V. The Habeas corpus ad Subjiciendum — This writ is deservedly considered by the Eng. subjects as their greatest security —

It is directed to any person whatever who ~~might~~ may have an other in his custody commanding him to bring before the court the body of the prisoner forthwith, that he may abide by what the court judged in the premises —

This writ affords an universal remedy for every illegal confinement whatever: — for if even the King him=
=self were to confine one illegally this writ will lie to relieve the prisoner — But a person committed by either House of parliament cannot be relieved by this writ.

Eng. C. 543.
2 Vent. 243.
Bac. B. & Mod
198. 3 Blac.
131. 2 ———

3 Blac. 132.
2 Mod. P.B. 132.

Private Wrongs.

At Com. law this writ issued from the Kingsbench and from Cha. and in some cases and in some case from the Common Bench –

It never issued from the Com. bench unless the prisoner was or by fiction was supposed to be a privileged person on account of his being an officer of such court. – And not even in this case would the common Bench issue this writ, if the person were committed for a crime Or rather the Com. bench could not in such case discharge the prisoner or let him to bail. –

It has been made a question whether at any time this writ could issue from Cha. during vacation time (for as to most purposes Cha. may be said to have a vacation) Ld. Nottingham refused to grant it, for as there was no precedent he would not make one – But either of the Judges might, and indeed were obliged by the law to grant it during vacation –

If the person in whose favor the writ issues be in jail the writ issues of course to the jailor, or if the prisoner be confined, in any other mode, whoever it may be who causes the confinement is ordered to produce the body & cum causa of his confinement. If good and legal cause of the confinement be shown the body of the prisoner is returned or remanded

If the return shews a legal commitment the prisoner is remanded no enquiry is had to as to the merits of the charge he appears to be committed under course of law. It may be the cause of commitment shews ~~to~~ is a sufficient cause for commitment tho' where but the place in which he is committed is improper in this case he will be discharged by court. in every case one of these things is done by the court either to discharge him or bail him or remand him

3 Blac. 134. 5 Mod. 22. 1 Vent. 330. 346. Salk. 349. Ld. Raym. 586. 618 —

If the cause returned shews no legal cause of commitment he is discharged —

3 Bl. 135. 136. 3 Bac. 7 - 8 —

if there is shewn a good cause of commitment but the place is illegal the court will discharge him — if the cause of commitment is sufficient and the place improper yet if it appears that there is now no cause of detainer the court will discharge him or in case of an exception put up. if it may be that the cause shewn is good the place where is improper that there is cause of detention if bail not given find that it is a bailable offence and bail has been offered the court will accept of bail and discharge him from prison

3 Blac. 136. 10 Mod. 429. Stra. 142 —

if the cause of commitment and detainer are sufficient and place improper ~~no~~ bail is offered on if offence the offence is not bailable in that case he is remanded

for if the commitment were legal, it is sufficient for the merits of the cause cannot be gone into under the writ and the prisoner must of course be remanded: Unless indeed it appear that the offence was bailable and that good bail was offered and refused because in such an event and if good bail be again tendered, it shall be accepted.

This writ issues both where the commitment was illegal and where altho' the commitment was legal the subsequent imprisonment was illegal.

But the provisions of the Com. Law have been frequently evaded: particularly by the family of the Stewarts, the Stat 32. Ch. III was made which more fully the benefits of this writ — and in commemoration of the great event of the passage of this stat. it is called the second Magna Carta.

This statute did little else than more than merely to confirm the old com. law — It enabled any of the 12 ~~superior~~ superior Judges to issue the writ at any time and if the court were not in session the judge who issued the writ was authorized to hear and decide while at his chambers.

This writ will lie in favor of children abused by a restraint or confinement by their parents — It will lie

The cause shewn is sufficient and the prisoner
insists that something has taken place that renders it im
proper to confine him as in the case of an Executor
paid and they is not returned and order issues to
the the person who confines to make return as to
the fact - In case of offences the return
is conclusive as to the proceedings of the
Court: but if they make a false return they
are liable to the person injured

8 Ath. 526.
1 Sev. 128.
Stra. 982.
Bur. 606.

If the complaint is ~~from~~ for confin
ment by a person in a private capacity
if the cause of detention is denied by
the complainant there is a summary in
quiry by the ~~Court~~ &c --

8 Doc. Eq.
A-B. 48. 12
Mod. 506.
Bur. 982.
431

confinement upon an Execution is a sufficient
return unless it is declared that he was con
mitted or detained since its discharge
confinement on a judgt in a criminal case
is a sufficient return and it appears the
[illegible] had [illegible] jurisdiction

Private Wrongs.

in favor of wards thus unjustifiably treated by their guardians or of wives thus abused by their husbands &c &c —

Any relation or friend may demand this writ and even it if it be not specially authorised by the person confined such friend is entitled in his own name, but in behalf of the person confined to have this writ —

If the person to whom the writ is directed do not comply with it — he is liable as well to be punished as for a contempt —

---

where persons claim from grants or regal by grant or estrays & waifs & wreck fairs markets ferries
2d when in case of corporations — when any jurisdiction is taken [illegible] 2 Ll 2028 Yel 171 2d Hal 205 Shuttle Cro [illegible] 561 Sho 279 Ld Raz 1559 — quare if against a corporation by their corporate name if against persons usurping against natural persons 2d Hen 8 69 — if corporations other than [illegible] by administration of [illegible] — if the public trade a right judgt for public if not that rest be ousted — so for abuse 12 Salk 176 Ld Show 281

Lewis the grievance ~~[illegible]~~ it is objected when there is no day in court to defend an name could have been taken the extent of this confined have procured application to a judge not as debito justitiae the judge must hear the it is ~~[illegible]~~ an extraordinary hearing and ~~[illegible]~~ if for any thing that appears to him there is cause of complaint the grievance is ready to bring the case before the court & if it is well founded the judgt is vacated & the plt becomes his damage as he received in an action on the case — when ifsuch a sufficient bond must be given to make good the complaint it must cover all the costs judgt & costs for as this just the deft is set at liberty and the bond is the only the writing of the case goes against the applicant 1st that little trifle grievance

Lex Mercatoria.

as delivered by Mr. Rowe —

This as its name designates, ~~designates~~ is the law regulating commercial concerns which is adopted in its general provisions by all Commercial nations, qualified and modified by their various customs and ordinances.

§ 74-75 — It has been termed the custom of Merchants; but the word Custom is not here used with legal propriety, for the Mercantile law is general; it is not to be proved as particular customs are, but has within itself particular customs, which must be proved in the same manner as those at Com. Law.

It is not exclusively the law of Merchants, but regulates all mercantile matters; and it stands in the same relation, with regard to commercial concerns, as the Com. Law does to all other transactions —

Bills called Sight, - month's calendar - days of grace
when payable at days of payment falls on Sabbath
reckon the month from the day. the days of the
date. the merchantable rate - payable at sight no
days of grace promissory note is binding called
negotiable in its nature - seal or any form
promise endorsed bills or acceptances of the State
of Ireland 1st Sess 129 2d Ed. Ira 757 the bank of Eng
Mr Chapman - corporations by their agents may give notes
the State of Ireland forbids it 2d case have no such statute
to the order of such a person strength 10th Mar 1786
payable to bearer is endorsed - not endorsed Dennen
nothing liable to bearer see questions were settled
1st Ed. 1786 - 3d Nov 1786 - the bearer must show he
came fairly by it - pay to Co. so must endorsement of money
in your hands belonging to the proprietors of clerks shares
mean 1st Ed Reg 1786 the bankers - Tommy to amount
for £50 or order - promise to accept a bill of such
amount the drawee has no effects yet bound for the
drawer may show the drawer yet entitled - the equitable
assignment between drawer & drawee Mason & Hunt
Dong - when accepted to pay 1st of month pay 1st Jany the
holder should not 1st March and wanted 1st Jany
at effect shewing 1st - ~~when an accept~~ the cash
of the bank note Rogsell vs Langstaffe - the cash
of bill endorsed blank was cancelled ~~by~~ acceptance and the
fund at the indorsee brought bearer 1st Reg 1771

Lex Merca.

The subjects of the Lex Mercatoria - - - - - -

Bills of Exchange, are regulated by their Law. Foreign bills are always regulated by it in all countries, and Inland bills are by the special ordinances of most commercial countries, regulated by it, as are promissory notes of certain discriptions.

Policies of Insurance, Charter Parties, Bottomry or Respondentia bonds, Bills of Lading, Laws of Navigation, and Factorage, are all branches of the Mercantile Law.

The varience between the Com. Law & Mer. Law

I. At Com. Law, choses in action were not assignable, so as to vest the property in the Assignee, & such assignment, was a species of offence termed Maintenance. But Courts of Equity in England soon began to infringe on a rule, which it was found difficult to preserve in a Commercial country, & compelled the debtor to pay the money to the Assignee. Since that, this has been collaterally recognized by Courts of Law, tho' they still retain the form of bringing the

the last case when the question in both orders ought to be
inserted in the indorsements subsequently to the first
of a necessary transfer by indorsement to himself being
an indorsee the indorsee to number & date any bill
the case of Burchnale in Bac. 542. Cannan vs Thelwy
vs Douglas Stoughton

action in the name of the original obligee: A promise by the debtor to pay the money note to the assignee, is holden good in law. So also, they have in certain cases made an assigned note a set off, to a claim brought by the obligor against the ~~obligee~~ Assignee; so that all remaining of the old Com Law rule is, the formality of bringing the action, in the name of the original obligee.

But by the Law c Merchant, such negotiable notes as are within its cognizance, are vested immediately in the assignee, both as to the legal & equitable interest, & without any privity of contract, the L. c M. raises an agreement between the drawer ~~and~~ drawee, the payee & the person holding the note,

II. Again, At Com Law, that species of contracts, termed Specialties are so privileged, that no enquiry can be gone into, to prove the want of a consideration —

By the Law c Merchant, all negotiable instruments after having been negotiated, are equally privileged, as specialties, but before they are negotiated, they stand on exactly the same ground as other instruments

at Common Law.

III. Again. Some Mercantile contracts are valid when there is no legal consideration, but merely that of honor; For instance, A, draws a bill on B. in favor of D. Creditor to accept it, B an old acquaintance standing by, honours it voluntarily, without any consideration actual or presumed, now by the Law Merchant, B, may maintain his action against A, for the amount of the bill, thus accepted, notwithstanding there is no privity of contract between them.

IV. Again. By the Com. Law of Eng. fraud in the consideration of a Contract does not render it void, tho' the party injured, has his remedy in damages, but a fraud in the Execution, always nullified Contracts.

The Mercantile Law destroys a contract attogather, for a fraud, however minute in the consideration. It requires an uprightness of honesty, such as the keenest moral sense, & most delicate integrity would dictate, & the least trick, equivocation, deceit or concealment of facts, destroys the contract forever. This however cannot extend to the concealment of private speculative opinions.

3 Vitr. 18.
Vit. Ro. 1235.
2 Venuti —

or surmiser.

In Connecticut by the rule of Com. Law, when the fraud is complete even in the consideration, it ren=
=ders the Contract void.

V. Again. At Com. Law, if Execution is obtained on a Judgment against more than one & one party be liberated from confinement, or otherwise discharged, this is a discharge to all, without a satisfaction, and often without a rational presumption of payment, altho' the law proceeds upon the ground of a presumed satisfaction.

But by the c Mercantile Law, a discharge of one, does not at all exonerate the remaining debtors.

VI. Again. By a general rule of the Com Law, Contracts by which property is agreed to be trans=
=fered, and a consideration, ~~for it~~ paid for it, are considered as executed, and the property vested —

But by the L. c M., if property be bought by one, & payment made by note or book charges, yet if the person of whom the goods were bought, dis=
=cover that the purchaser was a bankrupt, or even in falling circumstances, he may stop the goods <u>in transitu</u> & take them back into his own

3 Oktr. 18.
Bl. N. 1235.
2 Stück —

or remitter.

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=cover that the purchaser was a bankrupt, or even in falling circumstances, he may stop the goods <u>in transitu</u> & take them back into his own

Lex c Merca.

possession—

VII. Again. Com Lawmonths are reconed as lunar months, by the L. c M. as Calendar months.

VIII. Again. An instrument at Com. Law, to commence its operation from the Date, would include the day on which it is made, but if from the day of the date, excludes it, The Law Mercha. excludes it in both instances.—

IX. The Law Merchant does not at all nec=cognise the Jus accresendi of Joint tenancy—

Of Bills of Exchange

A bill of Exchange, has been defined to be, an Open letter from one man to an other, requesting him to pay a sum of money to a third person, or his order—

There are three characters concerned in a bill of exchange.

1. The the Drawer, who makes the bill.
2. The Payee, being the person in who's favor it is drawn.
3. The Drawee, or person to whom it is direct=ed, and by whom it is to be ~~paid~~ paid—

Lex c Merca.

A bill of Exch. in the hands of the payee answers the purposes of money, for he may assign, or indorse it over which instantly vests the property in the Indorsee.

The Indorsee of a bill may indorse it, his indorsee may also indorse it & so on indefinitely.

Every Indorser is quasi the Drawer, & subject to the same liabilities as the Drawer.

If a Drawee refuses to accept a bill, or having accepted to pay it, the Indorsee must sue the Drawer or any one of the Indorsers at his option.

The last person to whom the bill was negotiated is termed the Holder.

These bills after having been once indorsed ~~in full, may~~ need not again be indorsed, altho' they may be indefinitely transferred, but if the bill after such indorsement be seen so often transferred no one can be sued by law merchant except those who are parties to the bill on the face of it.

Those bills payable to Bearer, or to A. or Bearer may always be transferred without Indorsement, & when transferred by delivery they are as fully the property of the transferee as if they had been indorsed.

Stat. 8 & 4 Ann.
Comp. 9. 9 & 10 Wm. 3.
Comp. 17. ——

Lex Merca.

The Law Merchant ~~throug~~ throughout, proceeds upon the presumption that the Drawee has effects in his hands of the Drawer's, to the amount of the sum mentioned in the bill. A bill of Exch. is never received as payment, until the amount is actually paid. When a man purchases a bill, it is not as if he purchases an house, for if the bill is lost in the hands of the Payee the Drawer becomes his debtor to the amount of it.

Promissory Notes, payable to J. S. or order are by the Stat. 4 & 5 Ann, placed on the footing of bills of Exch. The distinction between notes of hand and bills of Exch. is sometimes difficult of perception.

The words "Drawer" of a Note & "Drawer" of a bill of Exch are sometimes ignorantly used as synonymous, but they mean very different things, for the Drawer of a Note is exactly on the same footing of an acceptor of a bill of Exch. The word "Maker" of a note recently used avoids this confusion.

Checks or draughts on Banks are regulated by the L. M. These are payable to bearer & always on demand; but of these & Prom. notes Plus ultra.

Bills of Exchange are drawn various ways,

Lex Mercatoria.

sometimes payable at sight, sometimes at a certain period after sight, & sometimes so long after date.

The term Usance made use of by Merchants, has been construed into various meanings, so that expediency seems to require that it be expunged.

The term is applied to the time in which a bill is to be payed & the time is regulated by the various customs of different Places. In Eng. and this country, bills made payable at Usance are payable within one month. Sometimes bills are made payable at double Usance.

It is a general ~~rule of Merchants~~ usage of Merchants, to allow some days after the expiration of the time at which the bill is to be payed, or offered for payment. These are termed "Days of Grace" In almost all countries three days are allowed.

When a bill is payable at sight, no days of Grace are allowed, altho' ~~more~~ apparently more requisite than in any other case.

Inland Bills of Exch. were not at all governed by the law Merchant, until by an English stat., (the provisions of which have been copied by most of the states in the Union) they were placed

1 Salk 124.
2 Ry. 757. —

Lex Merca.

on the same footing as foreign bills of Exch.

Bills of Exch. between persons of the same state are not it seems governed by the Mercantile law, tho' bills between different states undoubtedly are.

It has been much disputed in Eng. whether promissory notes made payable to J. S. or order were negotiable at common law, i.e. Whether the maker of such a note promises to pay any one appointed by the Payee & as soon as he appoints.

Mr Reeve believes this to be clearly the case at Com. Law, but on account of the great dispute, they were expressly made negotiable by the stat of Ann, and as soon as the note is passed from the payee to an other person, there is a debt immediately created between the Drawer & such person.

Who may draw Bills of Exch.

Any persons able to make any valid specialty contract may draw bills of Exchange & bind themselves thereby.

1 T. Ro. 40
4 T. Rep. 40.
Carth. 82.
2 Ven. 292.
2 Show. 601.
2 Burr. 696.

2 Show. 8.
10 Mod. 286.

1 Bl. Ro. 485.
3 Burr. 1416.

Lex Merca.

Infants may bind themselves for necessa=
=ries, but not by bond or bill of Exch.

But if an infant give a bill, which is ne=
=gotiable the person negotiating it is as much bound
as if it had been given by an adult.

A note payable to the order of J. S. is as much
negotiable as if made payable to J. S. or order, so of
a bill. A bill payable to bearer is clearly negotia=
=ble –

When three are Merchants forming a com=
=pany, the act of one binds the rest in all commer=
=cial concerns. It was formerly a question wheth=
=er one partner could bind the other or others, by
drawing or accepting a bill of Exch. The trans=
=actions in which bills of Exch. are used have been
=determined to be commercial, therefore when
one of the ~~partic~~ partners draws or accepts a
bill of Exch. in the name of the firm it will
be always binding on all –

But in cases of making bills or in any transact=
=ion not commercial one partner cannot bind
an other or other partners, altho' he does it in the name
of the firm, unless by special power given thereby

2 Vern. 277.
Esp. 524. —

1 Salk. 126.
Ld. Roy. 175.

7 T. Rep. 7 T. R.
209.

the other partners –

Suppose however it was a mans own individual commercial concern, his seperate interest; & he being a partner should either draw or accept a bill, would it bind the Company? It was at first determined that it would not. but now even if it be a seperate individual concern, other persons not knowing it to be so it will bind the Company, for they holding themselves out ~~for~~ to be a firm for very many purposes, it would be hard that strangers should be deceived by finding the responsibility to be attached to one person only, when they supposed it to belong to the firm.

Suppose a bill of exchange was drawn by ~~several persons~~ a person employed by several persons as a Factor, those only who assign the bill, will be liable or bound by the act of the factor; but if a Company having a joint interest authorize a man as their factor, & he draws a bill of Exch. they will certainly be bound.

It is not necessary that a Merchant sign a bill himself to render him liable – a –

Beaures 462.

Burn. 1216.
1221.

a signing by his Clerk who has been in the habit of doing business of this kind for his employer. So has is suffi:t

The next case to be considered is where A. & B. not ~~not~~ Merchants draw a bill on C. in favor of themselves i.e. payable to their ~~order~~ own order & C. accepts the bill and A. one of the drawers indorses the bill to B. another of the Drawers, Is this bill well endorsed so that C. can be sued upon it, A. & B. not being partners? Or should both indorse to render it good that is the indorsement good? Lord Mansfield let in Merchants to prove the Custom, altho' it was governed by the general law and therefore not required to be proved, & the Jury found it not properly indorsed — Mr Kent cannot reconcile this proceeding of L'd Mansfield with the rule that the Law Merchant can never be proved by Merchants let in as witnesses, & it appears that this did not depend upon special custom. For where a particular custom is challenged, proof is always admissible to prove the custom and the case will be governed by it —

The fact was that L'd Mansfield tho' a great genius and a very learned man claim

+ this rule ~~exp~~ not applicable to mates
cases just mentioned as an exception of this
rule.

1st the growing substance to £7 monthly
paid in (3 months)

2d so much out of the money of the worthies
preparations in your hands

3d funds so given out of Wm Stevens money

4th an account of freight &c

1 Bl. Ro. 445
487.

Ld. Ry. 758 —

3 Wils. 313.

2 Stra. 1271.

10 Mod. 294.
316.

Stra. 591.
Ld. Ray. 1301.
3 Wils. 307.
2 Bl. 780.
Stra. 1212.

Lex Merca.

& venerable nonsen was not a technical man, and often passed the boundaries of technical propriety, to give place to substantiat Justice - His L'dships in this case did not know the general custom.

Bills of Exch. (as has been observed) are privileged as specialties - They have also the peculiar quatity of vesting the property immediately in the transferee -

The properties or qualities of Bills of Exch. & Promts.

Every letter of request from one man to another desiring him to do a particular thing, is not a Bill of Exch. tho' it might be a valid Contract; for

1. The first quatity of a Bill of Exch is, that it's always for money & never for any collateral thing.

2. It must carry a personal credit with it not depending on any particular fund or Bank, for when a man sends an other a letter ~~a letter~~ to pay a sum out of any particular fund or Bank, this tho' a good Contract between the parties, is not a bill of Exch. for it ~~is~~ does not make the

1. There is no case of this sort having appeared
to bills cases just

1st pay out of the payments when it becomes due

2d to pay on under the body

3d to pay if it does not

4th to pay so many days after marriage Ld. Ry. 1481.

5th provided &c

Ld. Ry. 1545.

2 Stra. 1151. 3 Atk.
2 B. & P. 242.
Ld. Ray. 1362..
1396..
8 Mod. 368. ...
Ld. Ray. 1568. ..
1 Burr. 323 —.

Stra. 1217. ..
Burr. 217. ...

Lex Mercd.

Drawer answerable generally.

A Bill of Exch may appear to be payable out of a particular fund & yet the Drawer to be liable Generally — As a bill dated March & in the words Please to pay £50 of my half pay in one month which will be in next Sept. Now by the half pay here nothing can be intend but to inform the Drawee how he will get ~~payed~~ paid & it is but a request to pay the Payee £50.

It is remarkable there is not a single instance in which notes of hand, whether payable out of a particular fund or otherwise are not considered negotiable. The reason of the distinction between Notes and Bills Mr Bewe cannot easily perceive —

3. A third quality of Bills and notes is that they must be paid at all events not depending on any contingency whatever.

There is a nother set of cases in which there is a certainty, that the contingency or contingencies will happen, but an uncertainty with respect to the time at which they will happen — Of this kind there are no cases of bills of Exch. to

(a)

It is not necessary that the certainty should be a physical certainty a moral certainty will be sufficient to render the Will or note negotiable.

1 Wilm. 262.
Stra. 24. 2 Bl.
1072. 5 T.R. 485.
1 B. Bl. 239

Stra. 1212. 3 Atk. 214.
207. 8 Mod. 267.
1 Show. 5. 497.
2 Wilm. 353.

be found, but there are many cases of Notes in this predicament, which are allowed to be good, as a promise to pay so much money on the death of A.

(a) An other distinction is made, it ~~it~~ is said that when the time of payment is physically uncertain i.e. uncertain from the nature and constitution of things, notes will not be negotiable, but when the time is only morally uncertain they will be good as a moral uncertainty does not imply an impossibility, but what has happened may again take place.

In all the cases before mentioned, the contracts would be good as between the parties, but not being negotiable, would not partake of the qualities and nature of bills of Exch. or Promissory Notes.

Much has been said in the books as to the necessity of the words "Value received" in bills & notes. It is certain that they are generally used, but not that they are absolutely necessary. There have been many obiter opinions that they are not necessary in bills or notes which are negotiable instruments; for as soon

*L. Hardw. 25

2 Wils. 353.
Hard. 288. —

Stra. 674. Esp. cas.
51. 117. 2 T. R. 71.

as they are transferred they have every quality of Specialties and therefore a consideration will always be presumed & never suffered to be gone into — There has been one case in which the words have been decided not to be necessary —

Chitty, says that they are not necessary to be inserted, but that it is best to insert, for otherwise damages cannot be recovered if the bill is not accepted, or if accepted & not paid.

Is the word "Order" necessary? from determinations in N York, Mass, & Conn. it is necessary and Mr Reeve thinks the word "Order" a necessary and constituent part of a bill of Exch., otherwise their negotiability would be defeated & they would be mere letters of negotiation between the Parties.

Before a bill of Exch. is negotiated the want of consideration may be enquired into, as between the parties, but after assignment this enquiry is forever precluded, for as has been remarked an assignment gives to a bill of Exch. all the privileges of a specialty —

It is entirely immaterial whether the

Doug. R. Russell
v. Langstaff
3 T. R. 183 —

B. C.

3 T. R. 454. Cowp.
34 1. Doug. 636.
044 —

1 Mr. R. 445
3 T. R. 61.
Esp. cas. 166.

Indorsee knew that there was no consideration between the parties or not, in either case the bill is good in his hands —

Illegal Consideration

At Com Law the illegality or turpitude of a consideration is a matter open to enquiry. In these Mercantile transactions the law is some what different for in some cases the illegality does in others does not affect the bill in the hands of the holder —

Ordinarily, that which is at Com. Law an illegal consideration does not affect the bill in the hands of the holder if he be an innocent bona fide holder.

But when the holder knows the consideration to be illegal between the parties at the time of receiving the bill, he is particeps criminis and not an innocent holder and the security is not good in his hands.

If however he transfer it to an innocent & bona fide purchaser the reason of the rule ceases &

Doug. 234. 654.
Law vs. Walker.
Stra 1145.
Doug. 708. *
Incase of Gaming
and usurious con-
=tracts.
But the Indorsee
may sue his Indor-
=sor as on a new
note or he may
recover at com.
Law provided
the note was not
illegal when it
was given altho
it may be so when
it is sued for
Cowp 341. ondw.

1 Atk 715. Beaves.
~~460~~ 466. 3 Bur.
1663.

* Salk 127. Ld. Ry.
364. 574.

Bul. N.P. 270.

* Hardw. 74.
Stra. 1000.
1 Atk. 715.

cessante ratione cessat ipso lex.

But when these specialties have by statute been decl~~ared~~ to be "void to all intents and purposes" as in some instances they have the Courts have as the lesser of two evils chosen to fulfill the requisitions of the stat. and render them void in the hands of incent holders.

Of the state of the parties, & 1st Of the Acceptor and the doctrine of Acceptance —

Under this head the doctrine of promissory notes cannot properly be considered for the maker of a note is also the acceptor —

The Acceptance is an engagement to pay the bill to the holder —

A man who previously engages to accept a bill on its being presented, does by such engagement actually accept it.

* It may either before or after it becomes due

The most usual mode of acceptance is according to the tenor of the the bill; but this is not ~~universal~~ universal —

* It may be by writing or by parol in both

Stra. 648.
3 Bur. 1674.
1563

Beaves 454.
Cowp. 592.
574.
Doug. Mason
& Hunt

Stra 214.
11 Mod 190.
Beaves 481.

which cases it is good as both as to foreign & inland bills

On the ground of fraud & the stat. of frauds & perjuries parol acceptances have been objected to, but ineffectually for the presumption of law is always that the Drawee has effected to - the Drawer in his hands.

This acceptance need not necessarily be made to the holder altho' it usually is, & to whomsoever it is made, it is obligatory on the acceptor, binding him to every previous Indorsee & subsequent holder -

So a letter from the drawee to the drawer that he will accept the bill, is a good acceptance; but there may be equitable circumstances which as between the Drawer and Drawee, may exonerate the latter -

A bill may be accepted in part in which case it is good pro tanto. It may be accepted payable at a different time from that mentioned on the bill & as has been observed in many ways variant from the tenor, but in all these cases it is at the option of the holder to receive such acceptance or resort to his remedy against

1 T. R. 182. Cowp.
574. Stra 648.
1152.
2 Vels 9 ——

Stra. 648.

Gilb. Ev. 118.

B. N. P. 270.

Lex Mercatoria.

the Drawer or previous Indorser if any.

A conditional acceptance when the conditions are complied with is binding on the acceptor.

What constitutes an Acceptance.

Almost anything which can import an acceptance will bind the Drawee as writing "seen" or "presented" on the Bill. So also when it was said "leave it with me & I will accept it" it was holden a good acceptance; So also a direction by the Drawee to a third person to pay the bill has been holden a good acceptance –

An acceptance is an engagement not only to pay the holder but any subsequent Indorsee.

The Drawer if rendered liable by a subsequent protest, may recover from the Drawee, if at the time of drawing the Bill he had in his hands sufficient of the Drawer's effects to discharge the bill –

An acceptance betters the situation of the holder, by giving him an additional security –

1 Lo. Ry. 875-
3 T. R. 80. - -
3 Burr. 1516
1 Bl. Rep. 485.
Doug 611. 610.
or 663 633-
Aspell vs Longstaff 451-

must be applied on the honors
if mocked away only — if absconded or
never had state

may be applied by agent
personal appearance and to pray at defendant
here under the description
may by laws of same country be executed
the holder may by some act evince the negotiation
agreed to confirm negotiation at an end Doug 260
seeing paid and date a promissory note for
enlargement time an alteration by later

Lex Mercatoria.

Of the Negotiation of Bills of Exch. & Notes

If made payable "to bearer" a Bill may be transfered by delivery; but if "to order" it must be by Indorsement. These indorsements are ordinarily blank & after a blank indorsement such a bill may pass by delivery, but if the blank be filled up, it must be again indorsed blank before it can pass by delivery.

Of Indorsements.

Whenever a bill or note passes by delivery and the party receiving it, is a stranger to the bill on the face of it he cannot in case of non acceptance maintain his action against the parties to the bill by law merchant; But he may resort to his Com. Law remedy against the person transfering it to him.

The Indorsee may at any time make himself a party to the bill, when the indorsement is blank by filling it up with his own name.

This may be done by the Indorsee in two

1 Show. 165. 1 Salk.
128. 130.
L.J. Ry. 871 ——

2 Burr 1227.

Lex c Merca.

ways 1st By filling it up as being vested in himself, or 2d By filling in a power of Attorney to himself to receive the money of the Indorser –

In short anything respecting the bill may be written over a blank indorsement –

There is implied in the contract arising from ~~the bill~~ a bill of Exch. an engagement to pay not only the Payee and his Indorsee but every subsequent indorsee –

The Indorsee holds the bill with the same privilages against the Drawer or the Payee did, together with an additional security against the Payee and in all cases, with the same privilages against the Drawer that the Payee would have if there were a valuable consideration –

It is laid down as an universal rule that whenever the Indorser has recieved a valuable consideration from the Indorsee, he cannot so indorse it or to prevent or restrain the Indorsee from ~~negating it~~ negotiating it –

But when the Indorsee is only agent for the indorser a restrictive indorsement may be made, so as to be payable to a certain designated person

indorsed blank the holder fully
ryt as he pleases the case of
Pearson & Dawson & holden
and Dutens 1 Salk 130

Comy. R. 311.
1 Bl. R. 295
457.
2 Burr. 1223.
1216.

Indorsement includes not the word or order.

To Lt or order in chancery or will
to Lt by event the same thing
The case in which Ld Mansfield let in
the last money of witnesses as to
usage —
instances cases as they to feel
as one for every use
as where stock devests dividends
that it ought to be allowed
persons —
usually indorsement no matters

Doug. 617.
or 639 —

1 Burr. 452.
or 471. 1 Bl.
R. 485 —

B indorses blank delivers to D who indorses
blank delivers to ~~C~~ E may sue D or B
if the latter has most full holds ryt to shew they
authority or stole out the indorsement by
D to have a full ryt the indorsement of B is
made to him and this may be done at the
bar

Doug. Rep.
Peacock vs
Rhodes

Young Rep.
Appendix —

& him only.

* The words "or order" are not necessary to be used in the Indorsement to render bills or notes negotiable to any extent; for the Indorsee holds the bill with all the privileges of the Payee & by the words "or order" in the bill the Payee has a right to negotiate – Ergo –

When the transfer is by delivery, the bona fide holder has a right to recover it against the Drawer tho' intermediately it was obtained by fraud or theft. Now at Com. Law in every case except that of money, if a thief sell my property to a bona fide purchaser I do not lose my right to it, for Prior in tempore, potior est in Jure. The difference between money and collateral articles is made on a principle of policy, not to impede the circulation of the medium of the Country. The law Merchant on the same ground extends this exemption to bills of Exch. and also to a common draught on one's private Banker.

When two or more partners are joint payees of a bill, ~~of Indorsement~~ an Indorsement by one is binding upon all, but when a bill is made

A bill payable to B or bearer — to bearer payable to B or order assignable by indorsement or delivery, is also indorsement in the first case by delivery, in the second by indorsement in blank or delivery

by delivery or indorsement payable to bearer

1 Ld Ray. 606 — indorsee may sue blank — thus conveys on

assignee or receiver of attorney — if not always payable to

bearer the contract cannot be on the receipt of money Stra. 416.

125 1 Bos & Pul 163 — note assignable by delivery and

of delivery with blank and not indorsee fills it up

payable by delivery the bank may Bramwell 469.

stands and other indorsement blank on 9 Mod. 1.

bill receipt the money to 163. blank — this Carth. 5.

fully — indorsement on full 2 Show. 399.

payable to order note to indorsee

blank or full of blank payable by delivery

the indorsement may be written instead of Carth. 466.

order — any contents to order any right. this stay

person was payable to a bill indorsee this

is necessarily that the bill is due and

collectable on refusing payment design

Bramwell. 266.

2 Mod. 262.

1 Salk 65.

Lex Mercatoria.

3

payable to two or more persons who are not part=
=ners quatenus hoc, it is said to be determined that
to convey the property all must indorse.

Some persons are under certain circumstan=
=ces empowered by law to indorse; As when a feme
sole who is a payee marries, her husband may in=
=dorse without her.

So the assignees of a bankrupt may indorse.

So also may Executors of a last will and and
testament.

So to a trustee may indorse for the certui
que trust.

A bill cannot be so devided by partial in=
=dorsements as to render the Drawer liable in more
than one action.

Neither can it be so divided as to subject
the acceptor in more than one suit, unlys when
accepted it was previously indorsed over in par=
=cels: But if it were indorsed over in parcels, he
is liable in as many actions as there were seperate
indorsements.

If the Drawee pays a part of the bill, and
it is indorsed over for the remainder, the Drawer

Beaumes 469

1 Ken. Bl. 313.

in one ~~suite only~~ suit only.

Let us now resort to the Engagement of the Drawer.

The Drawer engages I To say the Payee that the Drawee is capable of binding himself II That he is to be found at the place where he is described to be III That he will accept the bill & that the Drawee will pay & in default of any of these, he becomes liable to the payee and his indorsees in infinitum, they performing the requisite duties on their part.

In case of non acceptance he is also liable for the interest on the Bill & the damages resulting to the holder ~~&~~ from the non payment.

The damages allowed differ according to the various customs of ~~Merchants~~ the Mercantile law in different places.

Before the revolution 20 p^c^ cent on the amount of the bill was recoverable over all the colonies, in cases of bills between America & Eng. but different customs have now grown up in different parts of the Union.

A man may render himself liable without actually drawing a bill, as when he ~~a mere~~ writes

Etna. 949.
Doug. R.
Chetwood
vs
Mayor

2 Show 441
494.

3 Mod 86.

2 Ch. 1295.
3 Lang Mag.
Bennet v. Page

his name blank on a piece of paper & deliver it ~~ba~~ to a third person with power to draw a bill over it.

Formerly it was disputed whether the drawer having become liable by the non acceptance of a bill, could be sued before the bill became due: It is now settled that the Drawer's liabili=ty commences instanter on the non accepta=ce; one of his duties having failed of being per=formed –

The Indorser's Engagement.

He is as to all parties subsequent to him=self quasi a new Drawer, and liable to them equally with the original Drawer –

Nothing will discharge the Indorser except what will ~~wiw~~ discharge the Drawer viz the payment of the money, for an ineffectual Judgment against one of the Indorsers or the Drawer, after the holder has made his election, is no satisfaction – This principle is known to the Com. Law –

Even an ineffectual Execution which does not raise the money is not a satisfaction by the

Lex Mercatoria.

by the Lex Mercatoria, tho' by the Com. Law it is & by the law Merchant a discharge of one taken on an Execution is no discharge to the vert contrary to the rule of the Com. Law: And by the L.M. the same person may be retaken after having been discharged.

The Holder's Duty.

All the Liabilities of the of the parties before mentioned proceed on the ground that the holder do his duty.

A bill becoming due a certain time ~~before~~ after sight, must be shewn to the Drawee within a reasonable time & without unnecessary ~~by~~ delay & if such delay intervene & a consequent loss insue the negligent party must bear it.

If payable at a certain time after date it is holden that the holder discharges his duty by presenting at such time & on the day on which it falls due.

If on being presented it is refused to be honoured by the Drawee, the holder must give

1 T. Ro. 170.

5 Burr 2670.
1 T. Ro. 712.
Strn 442.
2 Burr 669.

1 Lev. Ry. 743.
Strn 829.
441.
515.
649.

Lex Mercatoria.

Notice to all those against whom he ~~is~~ intends to proceed & those parties not notified are not liable —

This notice must inform the party notified, that it is the holder's ~~duty~~ intention to render him responsible —

The reasons for giving notice —

It is very important for the Drawer to be notified, that he may adjust his accounts with the drawee & obtain from him the property which the law presumes him to have of the Drawee & also that he may make provision for the payment of the Bill —

The Indorsers ~~will all~~ have all of them remedies against some person they therefore must be notified that they may pursue their remedies & secure themselves —

If the Drawee accept a bill variant from the tenor of it notice must be given to the Drawer and Indorsers as before —

Whether accepted or not, the ~~Draw~~ Holder must present the bill for payment & this within the time at which it was to be paid, including the

e Bl. R. 747.
Brooms 461.

1 T. R. 169.

1 T. R. 67.

1 T. R. 410.

the days of Grace: For the law presumes that the Drawee will pay, or at least affords him a long penitentia an opportunity to pay —

The time of Giving Notice.

Notice of non acceptance of all foreign bills must be given by the first Post, and after ~~pay=ment~~ presentation for payment by the first post afterwards, that it is not paid. —

Where their are no posts the first opportu=nity must be improved —

In inland bills Mr Reeve supposes the same rule prevails. When the parties are near neighbours the first opportunity must be em=braced —

If the Drawee have no effects of the Draw=er in his hands, the holder may sue the Drawer without notice —

Whether the holder has properly done his duty is a question of law arising from the facts, and is to be tried by the Court —

When there are no effects of the Drawer

1 J. R. 714.

1 J. R. 170
3 Bac. 614.

B. N. 271.

Lex Mercatoria.

in the hands of the Drawee, altho' no notice is ~~requested~~ requisite to the Drawee; the Indorsers to be made liable, must be notified.

The manner of giving Notice.

In Inland bills no particular form is necessarily or requisite nor in Promissory notes.

In foreign bills the mode prescribed by the law must be precisely pursued, and any deviation from it destroys the claim of the holder.

The Holder calls upon the Drawee & presents the bill for acceptance; the Drawee refuses to accept it: he must then apply to a Notary Publick who takes the bill & himself carries and presents it to the drawee for acceptance. The Notary then minutes upon the bill the time of his proceedure which is termed ~~noting~~ minuting the bill; He then draws up in his official capacity a solemn declaration, stating the facts as they happened & this declaration is a protest for non acceptance. All this must be done within the regular hours for doing business.

Beaver 1160.

Lex Mercatoria.

This protest thus made out must be sent away by the next Post to the party concerned & a copy or duplicate of it taken ~~of it~~ by the Notary & left in the possession of the Holder, is the evidence on which he is to recover, & is admissable as such in all Courts of Justice. The Holder can adduce no other evidence.

After this at the ultimate period of the bill's being payable, the holder must go to the Drawee again & demand payment, on the refusal of which the same formalities are again to be acted over, and a protest is to be obtained for non payment

The bill itself together with the protest, is then to be sent back to the Drawer by the first Post and this is the necessary notice —

A copy of the bill taken by the Not. Pub. is sufficient on the protest for non acceptance.

If the Drawee or is incapable to contract a protest is made by a Notary in a similar manner

When the Drawee accepts varient from the tenor of the bill, a protest for non acceptance must be entered & also for non payment, in case he will not pay the whole bill: But if the holder agree to accept of collateral articles in lieu of cash, no pro=

1 Lib. Reg. 743.

Beaves. 461.

Ulna. 649. —

Lex Mercatoria.

test is necessary—

If the Holder have his Bill accepted, & suspect the Drawee to be in failing circumstances he must for the benefit of the Drawer demand of the Drawee better security & on a refusal to find such security he must protest on that ground—

The effect of Notice—

This has been in a great measure anticipated by what has already been observed—

After the Holder has complied with the requisitions of the law, he is entitled to recover his money, the interest, his costs & damages—

At Com. Law damages are recoverable only for detention which is supplied by Interest

Originally these damages by the L. M. were uncertain but the ascertaining them in each particular case, was a matter of so much perplexity that a definite sum is now given p. Cent varying according to the different customs of different places—

There is one species of bills, which Mr Reeve has properly avoided mentioning until now viz.

Beaures 466.

Ob 1524

Lex Mercatoria.

Bills drawn to be accepted on the account of an other person who is indebted to the Drawer: As if A. in N.York draw in favor of B. a bill of exchange on C. in London on the account of D. in London who is indebted to A. In this case no contract is raised between the Drawer & Drawee: It is in fact a bill drawn to be accepted on a certain Condition which the Drawee at his option may accept or refuse.

But any man whatsoever may accept a bill in honour of the Drawer in which case a contract is raised between the Drawer & Acceptor: So also any person may accept on account of any or all of the Indorsers

In all these cases the Accepter must get the bill protested & give notice to the Drawer or Indorsor.

When a third person accepts in honor of the drawer or Indorsor, on refusal of the of the Drawee the Holder gets it protested & the accepter goes also before a Notary & subscribes a declaration in writing that he accepts it in honour of the Drawer or Indorsor to whom all these proceedings are sent & the notice thereby given

1 Wils. 185.

1 T. Raym. 269.

Beav. 464.

Doug. R. Black
vs. Reid —

raises a contract between the Drawer & Acceptor -

If the Acceptor has in the interim received from the Drawer any assurance of his acquiescence in the acceptance, he may pay it, without giving notice to the Drawer, otherwise he must give notice pro forma praescripta - Idem when accepted in honor of an Indorsor -

The presumption of law is that the acceptor is indebted to the Drawer until this presumption is removed therefore, he is liable to the Drawer for not paying a bill which he has accepted.

If the Drawee pays the bill pays ~~the bill~~ having no effects of the Drawer in his hands, the latter certainly becomes his debtor, & he may assumedly recover, But is his remedy by the Mercantile law? or must he resort to his Com. Law remedy? Mr Beawes is inclined to his com. law remedy at tho' he has seen no decided cases to this point - Sed tamen quaere

It is a general rule of the mercantile law, that an acceptance once made can never be revoked -

The holder however may discharge the acceptance not only by writing, of which no

of the discharge of his declaration

Doug Walpole vs Pulteney. Dingwall vs Dunster

A drawer to a wholesaler who had
indorsed Darnstead but finding
had no consideration for acceptance
has security of A endorsed over to
C that he had sold his wells and he was
not liable himself any further
A drawer brought to demand
of C the money he was debtor

Doug R. Ellis vs Galandon

Doug 237-239 —
A is C's creditor. D's bill and funds
I indorse D's finding that A was the
real debtor in order to A giving my payment

Stra. 733.

C's credit to D thinking here D's money
for some time of A there was indeed to be
a discharge — Doug 235-237

Wheatley. Ry. 744. Stra. 745. But. N.P. 271

Receipt of part from Drawer
makes of note an indorsement
no discharge of acceptor. only see Lawlo
that if there is no value received
was a discharge 2d Ld Raym 1549 Sel
Wilfords — . Red real attempt to recover
of drawer Stra 1265 2d Burrow 1099

Stra. 745.

doubt could exist, but also by parol declaration or acts equivalent to such declaration —

— to length of time short of the Stat. Limitations discharges the acceptor of a bill, nor does a receipt from the Drawee Payee or any Indorsee of part of the amount of the bill discharge him from his liability to pay the remainder —

A written promise on the bill by the Drawee that he will pay it, only adds a Com. Law security to that already existing by the L. c Mer. but does not at all exonerate the Drawee —

The principles of the lex loci govern in bills of Exch.

When the bill is accepted varient from the tenor of it (as for part of the sum) the Holder may receive such part as the Drawee will pay, for the benefit of the Drawer, but must protest the bill for the whole —

A receipt of part of the money from an Indorser does not discharge the ~~drawer~~ the Drawer says — Mr Rawson qu. Does not a receipt of part from the Drawee discharge the liability of the first indorser & all those previous to the holder & does not the

The holder of a bill indulgy the acceptor
he does it at his risk and subsequent
matter will not render the indorser 2 Burr 669.
liable — if he permits it to stay he will
be liable notwithstanding the legal con- 1 Ld. Ray. 443.
sequence of such indulgence. Chitty 102. in
the notes — Quere no value drawing an account
of a matter may accept for the honour of drawer
among particular indorsers the liable to all subse-
quent indorsers Ld Ray 575 and Burgess 76 —
Bankers notes what money yet to be a with growing interest
commonly at 3 or 4 pr ct 5 54 - of lender of them 4 Bur 5 54
Bankers cash notes do drafts on bankers the
receiver must demand in a reasonable time
Ld Ray 744. case 1115 Burr 673 received at three in
afternoon called at noon next day no effects
Doubts received 3 in afternoon sent early and
effects then when he came bank was shut 3 Bur 614
no effects D 530 a bill cage held a bill
D 910 received 12 in noon carried call. other
to a large amount he called at eleven then at two
more received and small note 2 days longer 1 Ld. Ray. 21.
given forged for £11 5 to 12 received after bank 175.
called at noon no effects more before noon
called next day after noon there was a bill
the cage on Thursday £402 given forged for £15 Wils. 189. 129.
the court granted a new trial.

Lex Mercatoria.

same reason apply mutatis mutandis to the case above.

Formerly it was holden that the Drawer must be resorted to before the Indorsor could be sued but this rule tho' attended with the ~~serious~~ convenient of avoiding circuity of action is now exploded —

Of the Remedies

When the a privity of contract exists between the parties, the Com. Law remedy may be resorted to as Ind. Ass. Debt. &c.

But the Mercantile law gives a special action on the case, founded on the custom of Merchants & unknown to the Com. Law. PLEADings

Formerly in setting out the custom it was usual to begin by defining precisely what the custom was, mentioning ~~narrating~~ its particular provisions ~~in detail~~ — and then to bring the case within it; but now as the custom is understood not to stand on the ground of a Com Law particular custom it is usual only to allude to it, but not as formerly to give its provisions in detail —

Institution proper to be made
to the end of B state made to B
proposed to be signed by two
are not signed by one - jointly & severally Comp. 859
2d Feb May 1544 - of division [illegible] and state
it was decided by the master

Authorities in
mass ——
2 Show 180. 422.
Sed. Reg. 364. 1542.
1376. 2 Ster. 817.
1 Wils 185. Doug.
Ruckton ~~Ashton~~ vs Coffen-
wall. —

Lex c Merca.

To give a right of recovery the case must be stated with all its circumstances of protest, notice &c &c.

In all cases the following circumstances must be stated ~~with all its circumstances~~; That the Drawer made his bill of Exch.; directed it to the Drawee, requesting him to pay the Payee or order a certain sum & that the bill was delivered from the Drawer to the Payee –

The time at which it was made need not necessarily be stated altho' it may be useful to state it in particular cases (as in disputes on the stat. Limitations)

A signing of the bill by the maker of it need not be stated – Suppose the suit is to be brought against the Acceptor by the payee over and above what is mentioned as necessary above an Acceptance must be stated, which implies a presentation –

The manner of acceptance need not be stated, contrary to the general principle of the Com. Law which requires a statement of the ~~quomodo~~ quomodo as well as the quid

that the owner accepted what it warrant it is
the same — Indorser must make out his bills and
the manner of doing this when blank when signed
&c or any against drawer or indorser necessary
to state demand of drawee or make of a note and say
notice the requisites and if notice only the con
sequence — no need to state demand of drawer
when the indorser is sued —
of this question if B C who accepts B indorses to D — and he
to A and at suit C against A the Ld Ch & B
indorser and other refused to pay for the negotiability
words of assent — 2 Show 18 A drew a bill in favour
of B requiring C to pay B B indorsed it to D & D to E
presented to C for acceptance who accepted and the presented for
pay C refused to pay that it was presented for non
payment and returned to B B who had notice
Hard says so — acceptance for honour how to state
[illegible] drawer see drawers what does be state 1 Ld
Raym 269 — if the bill want the negotiability
see in offering it and give it an indorse
a Ld pursuing the Evidence of security taken by
payee to drawer

Lex Mercat.

It may not be amiss to remark here tho' rather digressive that Evidence of acceptance after time of payment is good.

If the Indorsee bring the action against the Acceptor, this more is necessary to be said; that an Indorsement was made —

If the indorsements intermediately (supposing any) between the payee & indorsee were blank, the Indorsee may declare the indorsement to have been immediately from the Payee to himself; If they are filled up they must be stated ~~formally~~ in form and in order.

An Indorsement implies a written assignment & delivery, which therefore by the L.M. need not be specially stated —

If a bill is made payable to Bearer it is unnecessary to ~~have~~ state any Indorsement unless there having been an actual Indorsement you wish to sue the Indorsor —

Suppose the action is brought by an Indorsee who has paid the bill against the Drawer, it must further be stated that he has had the money to pay, in consequence of the

£2 4 3 8. 1 Salk 128.
Carth ~~409~~. . . . .
509.

1 Vez. Ab. 749.
1235.

2 Ver 115. —
1 Stra. 515 —

bills not having been paid –

Mr Reeve is of opinion that it is not necessary to state a promise to pay, in the Dft; but merely the facts which render him liable &c-q; the delivery of the bill is averred, & the bill imports a promise –

It is now an established principle that an Indorsee or Payee may pursue all his remedies at once he may have have suits against the Drawer, Acceptor and all his Indorsers at the same time; He may recover Judgment and take out Execution against all & tho' on a Com. Law principle as well as a principle of Equity he can recover but one satisfaction yet he may recover costs against each.

Suppose when all are sued one chooses to put a complete stop to the proceedings he must pay the debt and all the costs in all the actions; But if he pay the Debt and his own costs, it stops further proceedings against him & the other parties by tendering each ~~respectfully~~ respectively his costs and pleading full payment by the party afors^d may stop the proceedings –

1 L.D. Ry. 444.
Stra. 945. Burn
1354. 1 M. Ro.
390. 1 T.R. 654.

Lex c Merca.

If however Judgment proceed against all and against each for the whole sum, yet the Pltf. can take but one satisfaction & the costs from the other parties & if he do take more than one satisfaction he is punishable for a Contempt of Court.

So if the parties after Judgment tender the debt and all the costs, the taking out Execution is a contempt.

What must be proved.

All the necessary alligata which have before been mentioned must be proved.

The acceptance itself is evidence of the Bills being the act and deed of the Drawer & the acceptor cannot alledge it to be a forgery: Of course in an action against the ~~Act~~ Acceptor the hand writing of the Drawer need not be proved.

But if the acceptor honoured the bill without seeing it the rule does not hold for cessante ratione cessat ~~eiusdem~~ ipsa lex.

The Acceptor's hand writing, ~~is the proof of the~~ when the acceptance is in writing, is the proof

P. Rosante

20. Nov. 1774.
444
Burr 675 —
Etna. 479.

of the acceptance in other cases it may be proved by parol –

If the action is brought against the acceptor by the holder of a bill payable to order, the hand writing of the Indor for must also be proved, for the acceptance does not go to prove the hand writing of the Indorsor

Where there are several blank indorsements, the hand writing of the first Indorsor only need ~~only~~ be proved: but if the indorsements are filled the hand of each indorsor must be proved –

When the acceptance was upon condition, the condition must be proved to have happened.

In an action brought by the Indorsee against the Drawer, on a non payment of the Drawee the hand writing of the Drawer & Payee who is the original Indorsor must be proved, and this is sufficient unless there are intermediate special indorsments, in which case as has been observed, the hand writing of each individual special Indorsor must be proved –

If the bill is payable to A or bearer, no indorsor's hand need be proved, nor the hand

1 L.D. Ry. 174.
444.
Burr. 675. Stra.
479 — ——

10 Mod. 87.
1 W. Bl. 89.
1 Wils 185.

1 L.D. Ry. 741.

writing of any person but A. if to bearer no indorser hand need be proved —

In an action Indorsee vs. Indorser; it is suffi=cient to prove the hand writing of the Indorser, who is quasi a new Drawer & neither the original Drawers writing nor that of the intermediate blank indorsers need be proved but the handwriting of all intermediate special Indorsers must be proved.

In an action Drawer vs. Acceptor. The drawer must prove the acceptance (by the hand writing of the Acceptor); demand of payment & shew that it was not paid, by the ordinary evi=dence of a return of the bill with a protest.

It is not necessary to prove that there were effects of the Drawer in the possession of the Dra=wee for the law presumes this, & the onus pro=bandi is on the Drawee See the case Lawrence vs.

Suppose the action is brought by an Indor=sor who as yet has not been damnified, but notified, and consequently has himself paid it (I use the words of Ld Reeve) he must prove

3 Wils. 18.

Gilb L. Eq. 118.

3 T. R. 2 Q.
301.

1 H. Bl. 98.
10 Mod. 87.
1 Wils. 185.

that the money was paid.

In the case above it has been decided that the technical Com. Law payment by Indorsement is sufficient: this ~~last~~ decision certainly does not symmetrize with the principles of the M.L. generally, & is disapproved by Mr Reeve –

Drawee vs. Drawer: The Drawee must prove that the Drawer made the bill; & that he paid the money, having no effects of the Drawer in his hands –

A Protest is prima facie evidence of itself & requires nothing to substantiate it unless the other party attempt to prove it forgery & even in this case it is not necessary to prove the hand writing of the Notary, but merely to procure a certificate from the Executive or proper officer to certify that D. L. is a Notary Public.

When the Deft. has suffered a default it is not necessary to prove the hand writing

If a note be proved to be merely an accomodation note, not given in consequence of any indebtedness, & when in course of cir=

X. This rule could not with propriety be adopted here in the present state of our banking system — — ——

Burr. 452.
460.
3 T. R. 554 —

1 Burr 457.

Lex Mercatoria.

-cutation such note or bill returns ~~or bill returns~~ to the payee of the Note or drawer of the bill as Indorser he cannot recover –

Bank Notes

Are substantially the same as Bills payable ~~payable~~ to bearer tho' they are consider-ed for most purposes as money. Butter J. says "This Court has never yet determined that a tender of Bank notes is at all events a good tender but if they have been offered and no objection made on that account this court has considered it a good tender" & again "We have always been inclined to consider them as money" *

Checks Banker's or Goldsmith's Notes.

Are always accounted among Merchants as ready cash –

They are drawn on a certain discription of ~~men~~ persons termed Bankers & made pay-able either to bearer or to P.S. or order

I wrote blade company, cash 1st 5lbs 4d 6
draft received 30 Clock sent on the morning. left there called on the evening below
4 2,5 pill received —
note received on Saturday loaded on Friday morning the vessel thought at low
water 1st 5lbs 5 9 0 —
note at 12 feet note light at low feet by
received with other notes in morning
with at eleven. boarder gone called at
low & stopped payment 2d 5lbs 9 16 —
note after dinner feet at noon next
day on Leaches 2d 5lbs 12 6 8
note after eleven feet low
next day above near Leaches
5lbs 11 7 5
note received on monday sent early
on Tuesday & stopped the leaches heavy
4 5 2

1 Ld. Roy. 744

Kyd 27 —

Hopkins vs. Geary —
1 Atkins B.R.
Guildhall
1 W. Bl. 1 —

Lex Mercatoria.

A demand must be made immediately or within a reasonable time, at the risque of the Holder.

If the Goldsmith alias Banker fail, he who delivers the note in payment of a debt will not be charged, as the Drawer of a bill of Exch. would; but the receiver is supposed to give credit to the Banker: the note is regarded as ready money payable immediately, & as it is optional with him to accept, or reject, he takes it, if at all on his peril —

But if the party to whom the Note is given demand the money within a reasonable time, and the banker or Goldsmith refuse to pay it, this charges the giver of the note.

A Goldsmith's note indorsed, is a bill of Exch. against the Indorsor —

As to what shall be esteemed a reasonable time, the decisions seem to vary: It must at all events be ~~away~~ very soon after the note is received —

A received a Goldsmith's note at two O'Clock P. M. and presented it ye the next morning, the Banker had stopped payment 3/4 of an hour before

× Money on board may also be insured Stra 415.
416.
540.
910.
1175.
1248.

2 Bl. C. 452.
458.
Policy note.

3 June 1894.

and this was held to be a reasonable time and Mr Reeve says that it ~~watt~~ will always be time enough provided that the presentation of the bill is not deferred till the afternoon – The destinat=ion taken in Stra. 416 is not satisfatory to Mr Reeve

Policies of Insurance

"A policy of Insurance is a contract between A. & B. that upon A's paying a premium equiva==lent to the Hazard run B. will indemnify or insure him against a particular event."

What may be insured and who may Insure

+ The whole vessel, whole cargo & whole freight may be insured or either or ~~front~~ any part of them at the discretion of the owner, and this against any casualty –

The benefit of policies is not confined to navigation nor exclusively to mercantile ~~law~~ transactions, for any property may be insur=ed against any casualty. As lives, houses and many contingent events –

* Double Insurances come under this discription and are allowable only in special circumstances as when the Insurer is insolvent or dead --

Stat. 19 Geo. 2. c. 37 — ——

2 Bl. R. 460.

wagering policy what — — —

2 T. R. 161. 162. 165.

Lex Merca.

This kind of contract must be in writing and the writing is termed a Policy; the Insurers are generally called the underwriters & the sum given for Insurance the Premium which is payed in advance –

No extravagance of, premium can amount to Usury.

It is a general rule that no person not interested in the thing insured shall recover upon the policy: There was formerly some doubt respecting this until it was settled by stat.

But Mr Reeve supposes the stat. to be merely in affirmance of the Com. Law; for it is entirely contrary to the whole tenor and spirit of the L. M. it is no encouragement to the Commerce and repugnant even to the genius even of the Com. Law which discourages Gaming *Wagering policies therefore says Mr Reeve were not allowable even at Com. Law –

A wagering policy is then void altho' the ~~stipulation of "interest~~ stipulation of "interest or no interest" be inserted; neither can property

2 Bl. C. 458.

Molloy 361.
Malyne 131.
c. 81. Croft. 208.

1 Dior 7.

be insured for more than its value or more than the quantity of Interest had in it. 3 T. R. 663.

c Money lent on Respondentia or Bottomry bonds, may be insured.

Bottomry is in the nature of a mortgage of a ship when the owner takes up money to enable him to pursue his voyage & pledges the bottom or keel of the vessel (pars pro toto) as a security for the repayment. Here if the ship be lost the lender loses his money, if it returns in safety he receives it again with the premium agreed upon.

This originated from the power of the master to hypothecate the ship in a foreign country for the purpose of raising money to repair. In this case the ship & tackle as well as the person of the borrower are liable personally. In Respondentia bonds which differs from bottomry in this, that the merchandise and goods are bound and pledged for the payment of the principal with the premium on the safe return of the ship, in stead of the ship itself.

2 Saund. 200.
2 Venn 717.
3 Burr 1394.

39. R. 663.

3 Burr 1394.

2 T. R. 162.
to 165—

3 Burr 1905.

Lex Mercatoria.

Now the lender of the money having this interest in the ship, may get it insured, signifying particularly that the interest he has in the ship is money lent at Respondentia or Bottomry.

If property is overvalued to any unreasonable degree & this can be proved, the policy may be avoided. It has been decided that East India bonds could be insured as money

If Goods are insured they must be so under the denomination of Goods & no other.

A Reassurance is a contract of Indemnity, made between the original & collateral insurer & is allowable only when there is danger of Bankruptcy or Death in the Assurer. This is by a stat. provision 19 G. 2 c 37. — Quere is that considered as made in affirmance of the Com. Law?

Nothing can be governed by the Mercantile Law of Insurances, unless the thing insured be of a commercial nature: A fort insured in the East Indies was holden to come within the L. M. as being the property of Merchants.

1 Stra. 133.

2 Saund. 200.
Show. 324.

2 Atk 959.

Lex Mercatoria.

The Modes of Insurance.

Are various the most usual method is, for each insurer to subscribe individually as much as they chuse, until the Policy is filled, after which time additional subscriptions are void –

Some times vessels are insured lost or not lost by which is meant that if a vessel having been some time ~~lost~~ at sea unheard of, is insured & after the date of such insurance is lost the under writers are liable, but if found to have been lost ~~after~~ before the date of the Policy, the insurer will recover the premium only, & the under writers are discharged –

Vessels are sometimes insured at and from a ~~place~~ certain place, in which case the underwriters are liable for any loss or detention in Port, unless such detention or loss arise from the negligence of the owner. But if the accident causing such loss or damage might have been ~~[illegible]~~ avoided and prevented by the exercise of due diligence in the owners, the underwriters ~~notwi~~

4 Mod. 60.
Show. 326.

Salk 443.
Stra. 1265.
Park 339.2 A. M 551.

Lex Merca.

are relieved. So also if the voyage is laid a side —

If the ship and cargo are insured at & from, and before the cargo is put on board, the ship is lost, the underwriters are liable for the ship only.

If a vessel be insured from a place the liability commences from the time of setting sail.

Insurance may be made against any, and every casualty. As the perils of the sea capture, the mismanagement of the mariners or Capt. (who are generally considered as the agents of the owners & for whose misconduct the Insurers are not liable unless by special agreement) Thieves which is construed to extend to Pirates only &c &c —

Insurances are sometimes made upon express condition, as that the vessel shall carry a certain number of guns; shall depart with convoy and other things of a similar nature. Nor in these cases if the condition is not complied with one the Insurers ~~are not~~ are not bound.

In the case of convoy it is held not sufficient to depart with the convoy only, the convoy being bound to a different port but the voyage must be made in company with

Salk. 443. &
authorities ante

4 Co. Rep. 60.
3 Lev. 320.

3 Burr 1287.

the convoy unless unavoidable accidents separate them.

In the case it has been decided that the Insurers were liable for the vessel and property insured, from the time that it left the port, to that of its arrival at the usual place for taking convoy, contrary to the opinion of Holt.

If the ship is separated by some unavoidable accident from the convoy, the underwriters are liable, otherwise if separated by any willful departure or negligence —

If the vessel does not depart with the convoy the Insurers are to retain the premium, for there is no risque run — But suppose a vessel is necessitated to go from one ~~coast to~~ port to an other to meet the convoy & before she arrived the convoy had sailed, here shall the premium be retained? The general rule is that the Insurers shall keep the premium if the risque has commenced, but shall the whole premium be retained in this case where the risque is so small? This is still unsettled —

Etna. 1183.
1183.

Burn 1361.

Burn 1905.
onto 1919.

Lex Mercatoria.

It would be needless to particularize all the various modes of Insurance, indeed two assurances rarely agree in all particulars — Let us then proceed to consider —

What discharges the Parties —

This has been in a considerable degree anticipated by what has been mentioned under the preceding heads —

Fraud in any shape whatever will entirely destroy a contract under the Mercantile law. Any false averment of a fact, any misrepresentation or concealment of facts, which if known might tend to operate upon the minds of the Insurers, so as to induce them to enhance the premium & any collusion to induce the underwriters will certainly vitiate & nullify the insurance —

If the fact not mentioned were one of general and public notoriety, such a one as the underwriter must be supposed to know, such as a declaration of war &c. the omission to mention it

will not vitiate the insurance —

Neither is it necessary for the party applying to reveal to the underwriters his surmises or specu=lations arising from facts not exclusively within his own knowledge, even if such opin=ions be sound & natural —

Most elementary writers lay it down that a Policy of Insurance, is not much higher in its nature than parol evidence, which may be explained altered & rendered void by parol. They have founded their opinions upon an autho=rity of a case in Salkeld 445 —

Mr. Reeve knows of no decisions recog=nizing this principle but the one in Salk. & one in Skynner. He conceives the authority in Salk. not to be law for it is opposed by the spirit of the Com law. & tends to pernicious consequences —

Wilful mismanagement of the Cpt. or Mariners discharges the underwriters ~~from~~ from their liability. As a deviation from their course without any apparent necessity or good reason which amounts to Barratry or a

Salk. 445.
1 T. R. 88.
~~2 H.~~ 2 H. 32.
Doug 16
1 Show 324.

2 H. B. 343.
5 T. R. 581.
Stra 1249.

Stra 1249.

Doug. 16.
346
2 T. R. 30. 32.

change of voyage &c

Going from one port to an other in its vicin=ity is not considered as a change of voyage, if done after the vessel has made her destined port, at tho' any considerable deviation previous to that would.

A Deviation which does not arise from the fault of the Agents of the insured however, but arises from unavoidable necessity or accident; such as a deviation in search of Convoy after seps=eration, or in consequence of stress of weather &c does not discharge the underwriters.

Where there is manifestly an intention to Deviate but the intention is not executed, it does not discharge the Insurer –

If a vessel deviates, the underwriters are liable to so far as to the deviating point at which the vessel leaves ~~the course~~ leaves the course to the place where she is insured even if the intention of the owners was known to to the underwriters before the sailing of the vessel.

But if a vessel insured for a certain ~~voyage~~ voyage actually sails upon an other & is lost before she arrives at the deviating point

Lex Mercatoria.

~~at which the vessel leaves the course to the place where the insured was~~ the insurers are not discharged –

This rule at first glance appears not to be reconcilable with the rule that an intention to deviate does not discharge the underwriters. But the difference in the cases consists in this; In one instance the vessel was cleared out for the same port to which she was insured, altho' actually intending to go to a different one, here when she was lost before she arrived at the point of deviation, the underwriters were held liable. In the other instance she was not cleared out for the same port to which she was insured & the Insurers were ~~held liable~~ holden not liable –

Where a man has procured his vessel insured twice only one of the Policies is valid, & the party must take his election which discharges the other who is bound to return the premium.

But this can only happen when the first insurers have or are likely to become Bankrupt –

Stra. 1173.

Stra. 1265.
1264.

Stra. 1243.

Lex Mercatoria.

When the owner is insured against the Barratry of the Master, & the Master for the interest of the owner deviates from the Course, the underwriters are discharged; for Barratry is a willful and criminal mismanagement or deviation —

But if the Master had deviated to gratify his own feelings, or interest it would have been Barratry —

When the Crew compel the Capt to alter his course it is not Barratry in him —

Vessels are sometimes insured "untill they arrive" & a certain time for which is commonly specified as being part of the ~~voy~~ voyage and in most Countries is limited to 24 Hours, within which period if any accident happen the underwriters are liable —

A vessel insured in this manner arrives in port & before she has been there 24 Hours is ordered to go back a certain distance and perform a quarantine; while performing it she is lost; the underwriter are liable —

Sometimes vessels are insured untill they arrive and are discharged the word

Sino 1236.
Molloy. 288.

2 Roll 248.

Stra. 1199.

Park 63

discharged is now settled to mean unloaded & landed, therefore when a ship arrives the underwriters are to see the goods unloaded if the owner or purchaser employs lighters or other boats to convey the goods ashore & after they are taken from the ship an accident happens to them by which they are damaged or destroyed, it is no charge upon the Insurer; But if the goods had been sent a shore by the boat, which is considered as part of the ship & voyage it would have been otherwise.

Insurance against the perils of the sea includes all damages from winds, waves, tempests lightning &c —

If a vessel is not heard of within a reasonable time, she is considered, to be foundered at sea. In the case cited from Strange, in a voyage from Carolina to Eng.d when the ship had not been heard of in 4 years, it was accounted a reasonable time — Mr Reeve thinks a much shorter time would be holden as reasonable —

2 Vern 176.

1 Ver. 98.
Dum. 68 B.

1 Vern. ante.
Stra. 1065.
3 Atk 195.
1 T. R. 187.

Stra. 1065.

Lex Mercatoria.

Underwriters are liable in case of Embargoes or a detention of any kind by a foreign power unless it arise from mal conduct of the master or mariners, or an attempt to evade the duties &c.

Loss is total or partial & average.

The word "total" as used in the mercantile Law does not mean the same thing as total in common parlance: a loss less than total may be a total by the L. M.

Whenever there is a total loss the insured must abandon the property saved to the insurers and this property is termed the salvage

Generally if a ship be captured by an enemy & afterwards re-captured the loss is considered total.

Where the salvage falls short of the freight the loss is total.

Where the Salvage amounts to more than the freight it is an average loss, & generally an average loss is any loss less than a total loss.

The insured may abandon in the following ~~cas~~ cases: Viz: 1,, When the salvage does not exceed the freight 2,, In case of capture

Burr. 683.
698.

Burr 1198.
3 Atk. 189.

3 Atk. 195.
1 Wils 190.
Sta. 1250.

Lex Mercatoria.

as soon as the owner hears of the Capture he may abandon; but if he do not at that time ~~at~~ abandon & the capture should only prove a hindrance, it may be a partial loss —

In case of re-capture the recapturers generally have a reward for it which is termed "Salvage"

If a vessel is ~~sub~~ recaptured & proceeds on her port of delivery, before abandonment the loss is average if the abandonment is before her arrival at such port the loss is total.

The ship Success being insured from London to Carolina was taken by a Spanish privateer and afterwards retaken by an English vessel and carried into Boston where no person appearing to give security she was condemned & sold by the Court of Admiralty; the recaptors had their moiety and the remainder remained with the Officers of the Court it was held that the loss be a total one and the money go to the underwriters.

Where there has been an immediate ransom, it is an average loss —

Burn 904.
1 Venn 98.

Lex Merca.

At the close of the revolutionary war a letter of Marque sailed from N.York and took a valuable prize soon after which she was lost, The owners not knowing that she had taken a prize, abandoned, and the next day the prize arrived which was much more valuable than the vessel insured the loss was considered total and the prize the property of the underwriters, as belonging to the letter of Marque.

A Declaration formed to recover upon a total loss, is good to recover upon a partial or average loss & if a Pltff. fail in his action upon a total loss, he may upon the declaration recover upon an average loss.

Charter Parties.

When a merchant agrees with the Master of a vessel to hire the vessel to take goods to A; ~~or to A.~~ and to bring others back; he is said to charter the vessel, and the written instrument containing the agreement is called the Charter Party This is either a certain rate per ton or for an agreed sum in gross.

2 Ten. 212.

1 Sid. 246—

Lex Merca.

Vessels are said to be chartered, either outward & inward, for a ~~voige~~ voyage, or outward and inward.

What is peculiar in this species of contract is that if the vessel is lost before she reaches her port of delivery, provided she is chartered for her outward voyage, the ~~factor~~ freightor, pay nothing: If she is chartered outward and inward and arrives safely at the port of delivery but is lost returning, only the inward freightage is lost. If she is chartered inward only and lost, the freightor pays nothing. If chartered for the ~~voige~~ voyage and lost going or returning nothing is paid –

If the vessel is chartered out & in, ~~& out~~ out, delivers her cargo and per default of the Factor takes none on the return, the freightor pays as much as if she had brought his goods: But if it is by default of the Master, that she did not bring the freightors goods – the freighter is only liable for the outward voyage.

If the Master imprudently and contrary to custom, – sail in a storm, or up a river or in other dangerous places without a pilot and any damage issue there from the owner and master are held liable –

Though if the ~~factor~~ freightor, chuse he may abandon by relinquishing his goods and relieve himself from the

Burr - $42.-
$8 $.-

Burr. ante—

freightage — but he must abandon his whole interest; or none at all.

If the vessel be ~~disenabled~~ disabled without the fault of the owner, he may refit, if he can do it, within a short time, or he may be entitled to ~~part~~ freitage —

So if the vessel be captured and recaptured or ransomed, or if it be disabled and the freightor — chuse to take the goods anywhere except at the port of delivery, he shall pay a ~~rail~~ rateable proportion of the freight — or if when the ~~accig~~ accident happened the vessel had performed one half of her voyage, one half of the freight shall be paid —

Merchants sometimes freight vessels without putting their agreements in writing. This is not a correct or safe mode of doing business, but it is recognized by the Law Merchant, and has this peculiarity in it. Viz. If the ~~Factor~~ Freightor from any cause chuse to recede from his bargain, he may do it at any time before the loading is commenced by relinquishing to the Master the <u>earnest money</u>, which is a sum always paid by the freightor to the <u>Master</u> and necessary to render the contract binding.

The Master may also recede from his bargain by paying back double the <u>earnest money</u> i.e. by repaying

1 T. R. 18. 78.

Hardw. 85. 194.

the Merchant the earnest money advanced by him & as much more.

But by the Com. law of Eng. the party damnified may bring his action on the case and recover all damages arising from ~~the~~ a breach of the agreement.

When a Merchant freights a ship, but does not hire her (as when the owners supply every thing for the ~~voige~~ voyage and receive the goods at a certain pre=mium) this is termed ~~freighted~~ freighting without Charter Party.

When any injury happens to the property of the freightors thro' the misconduct of the Master, whether it be omission of duty, or commission of wrong, he must be answerable; but injuries arising from no defaett or misconduct, but from inevitable accident, subject neither the Master nor Owners. Quod Minum!

A special contract between the master and owners that the former shall have the benefit of the freight, does not effect the freightors, nor in any wise alter the liability attached to the owners in case of a mis conduct or neglect of the master; for the freightors are not supposed to be privy to the special contract.

Sometimes a special contract is made be=tween the Freightors & Owners. This subjects the ow=

In case the vessel is hired out the owners have nothing to do with the appointment of the master then what is said will not apply to the liability of the owners for master's fault falls to the ground

Vent. 190. 238.
1 Rhod. 85. 2
Lev. 69. 3 H.
259. L.D. Ky.
918 ——

1 Hard. 376..
2 Venn. 443.
Comp. 636..
1 T. R. 78. 108.
2 Venn. 643.
1 H. Bl. 119..

-ness no farther than the law itself would subject them, except that if there be a penalty annexed to the agreement; that is forfeited; also, it may ~~deserve to show~~ serve to show that the freighters are to look exclusively to the owners to whom the master is in turn responsible –

Embezzlement, or anything of the kind, either in the Master or mariners subjects the owners to the whole extent of the embezzlement –

It is a general principle that persons employed to convey property from one port or harbour to an other as packet masters boatens &c stand on the same footing as common carriers & are liable not only for neglect but at all events, except in cases of inevitable accident or the acts of Providence –

If a freighted ship is at sea and an accident happens which ordinary care could not have prevented the owners and masters are excusable but if a loss happens in port, they are governed by the law of Common Carriers.

The Mercantile law gives to all masters of vessels when abroad the power to contract for necessaries so as to bind the owners: Having furnished the master with ~~such~~ money for such purposes does not discharge the owners, for the

Hardw. 85.
195.
376.
Lom. L. 230.

2 Vern. 643.

Molloy 220.

1 Leith. ~~Hen~~.
2 G. D. Ky. 235.
2 Vern. 643.

master is to be accredited as their servant for whose contracts they are liable: He may even pawn the ship for necessaries: the master is also personally liable in this case—

An owner of a vessel cannot get rid of his liability to persons furnishing provisions, or necessaries for it. As where an owner leases his vessel for any number of months or years, and within that period it becomes necessary to ~~finish the vessel~~ furnish the vessel with tackle, or provisions, the owner tho' he may not know where the vessel is, and may have no interest in the freight, is still liable in default of the master. This is not founded on Com. law principles; for such owner it is said is not liable for the fault of the master: and the master tho' he contracts as agent for an other, is also contrary to the Com. law rule, holden bound.

When there are joint owners of a vessel, the majority of such owners in interest shall direct its course and destination, but cannot compel the minority to assist in fitting for the voyage. But altho' they may do this without the consent and contrary to the wishes of the minority in interest, yet it cannot be done without their privity—

If the voyage is a profitable one, the gain ~~sho~~ shall be equally divided among all proportionally to their several interests and the minority shall become

Cartwright ante
Ld. Ray 223.
Cro 285.
Hardres 479.
6 Mod 162.

Molloy 221.
Vent. 297.

Wms. 465.

liable to pay their ~~proportionable share~~ proportional share of all expences and disbursements –

But if the majority chuse, they can take all the profits of the voyage to themselves, by giving sufficient security in the courts of admiralty to make up all losses to those of the owners who do not consent –

Indeed the minority may by applying to the Court of Admiralty compel the majority to give security for the safe return of the vessel; and the recognizance is suable in the Admiralty Courts –

But where two joint owners sent out a vessel without the consent of the third, and she was lost the third was obliged to bear his proportion of the loss; because had there been a profit in the voyage he would have been entitled to his share: But in this case there had been no application to the Admiralty Courts, as there ought to have been.

The account of the voyage settled by a majority of the owners binds the rest –

When a loss happens at sea in consequence of stress of weather danger of shipwreck &c it is a principle of the Law Merchant to equalize the loss as much as possible among all the owners and freighters of a ship;

Sig Olenon,
Elop. 11. —

Molloi 4,5.

Lex — Mercat.

for it would be extremely unjust that the whole weight of loss should fall on the person whose goods are sacrificed in ~~extreme danger~~ time of extreme danger for the preservation ~~sent~~ of the rest.

In such case the laws of Oleron (which are the foundation of the ~~law~~ Mercantile law of Europe —) make it the duty of the Master first to throw over board the heaviest articles and those of the least value: and the oath of the Mariners that the property was thrown over for the preservation of the vessel discharges the master —

So also goods damaged, according to the laws of Oleron are cleared by the oath of the Master and Mariners.

This principle which uniformly governs in averaging these losses is that they are to be averaged only when the loss of the property sacrificed contributed to the preservation of the remainder.

There has been a decision which does not perhaps entirely quadrate with this principle viz. where a master took in more freight, than he agreed to do in consequence of which part of ~~which the~~ the goods were thrown over board, the loss was not considered average. Qu. Would not the Master in this case be liable? —

Where goods are taken away by Pirates, the loss says Mr Reeve, must be borne exclusively by those whose

Molloy 246.
to 250 —

2. Ld. Ray. 805.
Latch 252. —
2 Sid. 261. —
Molloy 237.
Leg. Elenor
& Cap 22 —

Hob — 11 —
12

Moy. 95. Pa. Rc.
Ch 342

2 Sid 265 —

goods are taken: but in this case might not the giving up a part of the goods preserve the rest from plunder and so contribute to their preservation?

A vessel was loaded with silk and oil, the silk be=longing to one person and the oil to an other: she waycha=sed by a privateer and run into port: The master fearing that she was not safe got out the silk and threw it on shore where it was saved: but the bulk of the oil precluded the possibility of landing it and it was taken: The owner of the oil filed a bill in chancery to compel the owner of the silk to average the loss, but the Court refused for the sa=ving of the silk did not contribute to the loss of the oil nor did the loss of the oil to the saving of the silk.

By the Com. law the Master of a ship could not impawn the ship or goods, for there was ~~not~~ in him no property ~~or~~ either general or special and no such power is giv=en to him by constituting him Master.

Yet the ~~Com~~ law merchant has esteemed the law of Ne=cessity reasonable which empowered the master to impawn or hypothecate the ship for necessaries.

It is laid down that a hypothecation by the Master when no real necessity exists, for such hypoth=ecation subjects the owners equally as one made upon

Molloy 359.

2 Bl. Com.
457. Molloy
de jure mar
g. 360. 361. Eno.
g. 208. 508.
Flo 70 ——

Lex Mercatoria.

the most absolute necessity, for he is the confidential agent of his employer - and the person to whom the vessel is hypothecated is not to judge wether or not there be any necessity for it - But the owners are left to their remedy against the Master.

Of Bottomry Bonds.

Bottomry bonds agree in many particulars with hypothecation, for in bottomry bonds the ship is taken, or pledged as a collateral security for money lent, altho' the obligor in case of a safe return is personally liable -

A bottomry bond may be defined to be an Instrument, by which the owner of a ship pledges his ship, and is likewise personally bound for the repayment of money lent, depending upon the contingency of their making a safe ~~return~~ return - If the ship is lost so also is the money of the lender; but if it performs the voyage in safety he receives back his principal together with the premium agreed upon - which no extravagance in the rate can render usurious - For the extraordinary hazard encountered by the lender, balances the extraordinary interest which he may receive and renders the contract reciprocal -

In this species of contract the tackle or well

2 Bl. R. 458.

2 Bl. ante
Chr. notes

Doug. 356.
or 371. 3 P. Wms
402. 1 W. Bl.
37. 2 Hob. 247.
Bl. Rep. 998.

as the ship (if brought safe home) is liable as well as the person of the Borrower.

But if the money is borrowed upon the goods and merchandise only, the borrower is liable personally for the contract, and is said to take up money at respondentia.

The general nature of a respondentia bond is this the borrower binds himself in a large penal ~~pound~~ sum, upon condition that the obligation shall be void if he repay the ~~tender~~ lender the sum borrowed, and so much per month from the date of the bond; till the ship arrives at a certain port or is lost or captured in the voyage. The respondentia interest is often ~~from~~ 40 or 60 p^r^ Cent.

The Law of Partnership.

To render a man liable as a partner there must be either a contract between him and the ostensible person to share jointly in the profit and loss; or he must have permitted the other to make use of his credit and to hold him out as a joint ly liable with himself.

Merchants trading in partnership are as tenants in common, for the law Merchant does not recognize the jus accresendi of survivorship incident to joint tenancy.

Salk. 444.—

3 T. R. 488.
435—

Salk. 444.
1 Show. 188.
188.
190.

See quina

Salk. 444.—
Comb. 474.

Lex Mercatoria.

The property of a deceased partner vests in the hands his Exr. but the surviving partner has the right of giving to collect such of the joint property as is not in possession. he has the right however under a liability to account with the Exr. of the deceased partner –

A surviving partner may not join in one declaration a demand accruing to him as survivor, and a demand accruing to him in his individual capacity –

Survivors of Merchants in partnership must sue and be sued by themselves, that is the Exr. or Adm. of the deceased partner must not be joined with them in the suit.

The survivor must account with the Exr. of the deceased partner and pay him his proportional share of the partnership property – It has been contended whether the surviving partner shall take all the goods and account for one half of their value (in the case of inequality of interest between two partners) or take only one half of the goods: Mr Reeve thinks that he should take one half of the goods.

It has been said that the surviving partner has the absolute control of the joint property: This idea Mr Reeve considers as being very inaccurate; for an absolute control seems to be equivalent to a complete owner-

-ship.

The true rule seems to be that the property vests in the Exr: by reason of the inconvenience of joining the survivor and Exr in an action (since in their case one would sue in his own right and would be liable to costs & arrest: & the other in the right of another and would not be so liable) the former is vested with the power of collecting so much of the joint property as is in action.

"The joint property of the partners is always liable for partnership debts and so long as it continues solvent, for the private debts of each ~~other~~ partner.

The private property of each partner is liable for the debts of the firm provided it exceeds the private debts of the ~~the~~ joint partner.

While the partnership continues solvent any person may levy execution on the goods of the Partnership for a debt of either of the partners; may sell the whole of the property on which he has ~~levied~~ levied, and remit to the other partner or partners his or their proportional share of the avails: (in which case it is usual to levy on a much larger quantity of property than is sufficient to pay the debt) or he may levy only on enough to pay the debt if it do not exceed the proportional share of the ~~joint tenancy~~ joint property

B & C merchants and partnership insolvent partnership debts $1000 partnership effects $250 this applied to to partnership debts pays 5/ on the pound B owes on his private capacity $1000 dollars & his private effects amount to 1250 his private debts are paid in full & the surplus is applied to the company debts & pays 5/ on the pound –
C's private debts are $1000 dollars his private debts amount to 1500 million case ....

Beawes L.M.

Co. Lit. 187.
Salk. 444. 1
Show. 189.
2 Ves. 255.
1 Ld. 148–

in which case it might be better to levy on the whole and remit the sur=plus to the other joint partners.

But if the partnership be insolvent, the private estate of each partner is first liable for his private debts; and the sur=plus if any, then ~~to~~ goes to pay the partnership debts: for the case may be a private creditor may receive 20/ on the pound and a partnership creditor only ~~one~~ 1/-

Each partner is not bound for the private debts of the other; for if one of the partners becomes insolvent the partnership is dissolved and the company funds are divi=ded among the proprietors—

Therefore ~~both~~ both partners are liable for the Co. debts and for the whole of it; but the company is not lia=ble for the private debts unless the partnership debts are first discharged by it. Ds this rule Law Lucrum in the last Pa. ed

Although the Exr. of the deceased partner cannot on a ~~principal~~ principle of convenience join or be joined in a suit brought by or against the partnership concerns. yet he is invested with every other power which the surviving partner himself possesses.

If the surviving partner ~~himself~~ be unable to respond the damages which may be recovered against the firm the Exr. of the deceased person is liable: In this case the

Doug. 871. 872.
19. Ves. 682.
2 H. B. 247.

1 Ves. 365. —
374. —
1 Eq. ca. ab. 8.

5 T. R. 601.

creditor having obtained a judgment against the surviving partner, which is ineffectual to obtain satisfaction, may bring an action of Debt on the Judgment against the Exr. In Eng. this action is customarily brought in a court of Equity atho' in the apprehension of Mr Reeve unnecessarily. In Con. it is brought in a court of Law.

Money may be paid to the Exr. of a deceased partner and very reasonably: for the Exr. might discover the surviving partner to be in failing circumstances, in which case he could have no remedy, and as the creditors would eventually come upon him, it is reasonable that he be secured.

If A. & B. transact business even in separate houses under an agreement to share in each others profits: each is liable so far as it relates to the right of third persons for the other's losses atho' there be an express stipulation to the contrary.

If one partner be charged beyond his proportion Equity gives him a lien upon the partnership effects.

When partners in trade become bankrupts the mode of settling the estate is to apply the joint property to the payment of the company debts, and the private estates of the ~~parties~~ partners (in the first instance) to the

1 Ver 366. c
2 Mod. 279.
1 Show 170.
3 d Rep. 871-

pay of their respective debts: If there be a surplus of private property it is also liable for the debts of the Company.

If there be a surplus of the joint property and a deficiency of the private: so much of the former as belongs to any one of the partners may be applied to the payment of his private debts but not to the payment of the private debts of any other partner —

If one of the partiers be insolvent, the other solvent and there is a surplus of the joint property; the surplus is divided, one proportional part being applicable to pay the debts of the insolvent partner, and the remainder to be divided among the remaining partners —

Before either of the partners become bankrupts the foregoing principles are not applicable: for this property both joint and several is liable indiscriminately for every debt joint or private; and a levy may be made upon the estate of either or both — upon the partnership property or upon the private effects!

But when they are ~~capable of paying~~ incapable of paying their debts the before mentioned principles apply —

However when A. one of the firm owes a private debt no execution can be levied upon the private effects

of B. an other partner; Altho' the company property may be levied upon; but in this case the property of B. who never consented to pay the debt of A. is taken away and to remedy this defect or injustice two modes have been devised I. When the goods of A. & B. merchants in company are attached for the private debt of either, only one moiety of them is sold as where a levy was made upon two barrels of ~~flour~~ flour one only must be sold and if it is not sufficient to discharge the debt two more must be levied upon and one sold and so on until the debt be discharged II. But the mode which has ~~been~~ been found much the most convenient is to levy upon and sell property to twice the amount of the debt and return a moiety or proportional part of the money to the private estate of the other partner—

For the difference between a partnership and a ~~joint~~ contract vide 1 H. Bl. 37.

One partner cannot recover in Indebitatus Assumpsit a sum of money received in the other on the partnership account unless there be a balance struck. ~~Although if the money received in partnership produce~~

After the dissolution of a partnership, the partner authorized to receive and pay the debts, cannot bind the other by giving a security in the name of the firm.

4 T. R. 706.
727.
728.
1 H. Bl. 45.
48.

Salk. 292.—
Bl. R. 993.
Comyn. 449.

Burr. 100.
Cal. 202.

Lex Mercatoria.

If one of several partners contract as for himself i.e. without ~~disclosing~~ disclosing the partnership: still if the contract be in fact made for the partnership: proof of this fact (altho' at the time of making the contract it was unknown to the party contracting with the partner) will render all the parties liable.

A contract made by one of several partners relating to the partnership business, binds the rest. And even after the partnership is ended or dissolved, a contract then made will bind unless public notice of the dissolution be given.

Factorage.

A factor is one employed by a merchant in one country to transact business for him in an other.

This factor acts under a Commission from his principal principal to the terms of which he must strictly adhere and the authority of which he cannot transgress.

Commissions are either general or special; a general commission of which the essential words are "buy and sell as your own" invests the factor with a discretionary power and renders him liable only for gross ignorance neglect or

Salk. 493.
2 Mod. 100.
3 Vern. 634.
10 Mod 144.

Salk. 126.

mismanagement.

A special commission in which the important words are "sell and dispose" does not give a discretionary power: he cannot as under a general commission sell the goods on credit unless at his own risque. for in the due exercise of his authority he ought to receive a quid pro quo and or he delivers the one to receive the other.—

The remedy against the factor was formerly in Eng. by way of account and is now, so here, but in Eng. recovery is obtained by an application to Chancery—

One and the same factor may act as agent for several Merchants, who tho' they may be strangers to each other must run the joint risque of his actions; As if five Merchants should remit to one factor five distinct bales of goods and the factor makes a joint sale of them to one man who is to pay one moiety down and the remainder at 6 mo. if the vendee fails before the second payment, each man must bear an equal share of the loss and be contented with the ~~dividend~~ his dividend of the money received —

But it has been decided that if such a factor draw a bill of Exchange on all of these five merchants and one ~~accepts~~ of them accepts, the other shall not be obliged to

1 Roll 124
Co. Lit. 89.
Mallow 495.
4 Co. 84 —

Cro. J. 468.
Poph. 143.
Gol. 137 —

1 Eba. Ca. 25.
Cro. Ja. 266.
Bac. Abbtt.
"Factors"

Lex c. Mercat.

make good the payment. Sed tamen quaere de hoc.

Fidelity diligence and honesty is expected from the factor and nothing farther and he is not liable for damages occasioned by inevitable accident or even for those which extraordinary diligence might have prevented as theft and the like.

And so on the other hand the same thing is required in the principal — for if a merchant by fraudulent representations of his goods or other fraud causes any damage to the factor he shall not only make it good but render satisfaction to the party damnified by purchasing under such false representation.

It has been decided that where a factor defrauded the state of its customs by ~~[illegible]~~ running goods, in which he encountered the hazard of a capital punishment, still not being discovered he was allowed to charge the duties on his principal and recover. Mr Reeve thinks ~~that~~ this to be "in the teeth of every rational idea and principle and an abominable practice" but is entirely of opinion that if the principal is cognizant of the act done by the factor he ought ~~for in running goods~~ to pay the duties; for in running the goods: ~~for in running~~ he runs the risque of his life but a contract with a factor to run the goods would

Stra. 1178. —
1182. —

2 Term 638 —

2 Ter. Rep 289.
Burr. 489. —

Cowp. 255.

not be being binding.

The ~~state~~ sale of ~~known to be such by~~ goods by a factor known to be such will bind the principal: But a factor cannot pledge them for his own debt.

When a factor is known to be such and even beyond his commission purchases his goods and promises to pay for them, the principal is holden: For it is not expectable that everyone dealing with a factor who is the accredited agent of his employer is to examine into the extent of his commission: But here the principal has his remedy against the factor.

If the factor does not follow his commission he not only lays himself open to damages but forfeits his commission itself; and his pay, which at Com. law he would not.

Where a factor was directed to ensure, and neglected to do it, he was held liable.

When the factor is ~~publicly~~ publicly known ~~such~~ as factor the principal may if he apprehends the factor to be unsafe notify his debtors not to pay what is due the factor or factor; and if afterwards they do pay him it is at their own risque. This applies only to public factors, for if he is only a private agent and sells

Lee i Burn. 489.

1 Term. 638.

Salk. 160 —

merchandise as on his own account, the person dealing with him is not atall accountable to his principal, more than to any indifferent person.

Factors have a lien not only for their com=missions but for the general balance of their in their hands.

It is important in the law of factorage that the factor is some times obliged to take better care of his principals interest than of his own: as where he sells the principals goods and his own together, he must apply the money first received to the payment of the debts of the principals his principal.

If the factor having property of his principal in his possession dies or becomes a Bankrupt, his Exr. or arrigneers have nothing to do with the principals goods, but (if it is) unless it ~~for the~~ money is so seperated and marked that it can be distinguished to be the property of the principal it will go to the arrigneers &c. The factor is not in that case considered as the prin=cipals debtor, but as his agent.

The stopping of goods in transitu.

This stopping of goods in transitu is a creature of the Mercantile law, for at com. law if a man sells his

2 Th. Bl. 505.

2 T. Pr. 69.
5 T. Pr. 688.

property it absolutely vests in the vendee at the time of making the contract, altho' the thing sold may remain in the possession of the vendor; but according to the law merchant when goods sold are delivered to the order of the vendee they may be stopped in transitu, that is before they come to the actual possession of the vendee.

But this stopping in transitu is never allowed unless the vendee is either a bankrupt or is supposed to be in failing circumstances; and is intended to secure merchants in their property.

The transitus ends when the goods or any part of them are actually delivered to the vendee; or even to his agent, provided it be at the agents place of residence.

Suppose a bill of lading has been consigned or delivered over to the agent of the bankrupt and he for a valuable consideration assigns it over to a third person. If the bill of lading is negotiable, the assignee of the consignee will have a vested property, and neither the ~~assignor~~ consignee or vendee can reclaim the goods.

The bill of lading has of late been determined to be negotiable.

2 H. B. 666.

2 Venn. ~~to~~
728.

1 Ibid. 129.—
Burr. 1844.

2 Venn. 728.
1 Ibid. 179.—

1 Ibid ante.
3 Burr. 1844
2d Ry. 576.
609—
1398—

2d. Ry. 1212.
19. R. 79.—

Lex Mercatoria.

Of Mariners.

The contract which seamen enter into is a voluntary one and every thing respecting it is regulated by the law Merchant

When there is no special agreement to the contrary mariners are entitled to their wages at the port of delivery.

If a vessel is lost on an ~~out~~ward bound voyage, they may receive their wages for the outward bound voyage notwithstanding they may have contracted not to receive their wages until their return ~~whome~~ home –

Indeed the law has restrained Mariners from contracting so as to lose their wages for if a seaman contract not to receive any wages until the vessel ~~return home~~ shall have returned home, and the vessel is returning is lost; he loses his wages only from the last port left –

Interest is due on the wages of a seaman from the time of the vessels arrival at the port of delivery –

Seaman ~~look~~ lose their wages by making a or disturbance on board the vessel in which case the Capt may confine or put them on shore; by rebelling against the master "unless they reasonably repent"; by wilful absence which occasions delay. And in all cases by leaving the vessel

2 H. B. 606.
3. Vern. 8.

Fitzgeue 376.
1 T. R. 167.
Kyd. 78
Doug. 62.
234. B. N. P. 374.
4 T. R. 148.

Lex c. Mercat.

before she is discharged of her loading.

A seaman disabled by accident to perform the whole voyage, is notwithstanding entitled to wages for the whole voyage.

Omitted and desultory rules examples &c.

At com. law whenever there is a time stated, within which any act is to be performed, and the day of the expiration of the period falls on a sunday or some noted feast day, the act may be done after: By the law Merchant it must be done the day before.

Also when any number of days are allowed for the performance of any act: the common law computes from the expiration of the day on which the instrument is dated to the completion of the last day allowed. For instance the Com. law would make a bill payable on the fourth day when by the law Merchant it ~~is acquired~~ would be required to be ~~payed~~ paid before the expiration of the third day of the days of grace.

Mr Reeve has never found a case in which it was decided that days of grace are allowable in promissory notes; but Mr G. seems to imagine that it has been settled that they shall be allowed in the cases quoted in the M.

Doug. 237.
8.
9
240

Esp. N. P. 115.
269.

Molloy 6.
Dart p. 308

The 8 Ed. of
Molloy is
usually quo=
=ted in these lectures

Lex c. Merca.

At Com Law a right of action once accrued cannot be given up by parol without a valuable consideration: But it may by the law merchant; as where a payee or indorsee of a bill or note discharges the indorsor or acceptor.—

It is to be noticed that such Endorsors of notes or bills as the holder chooses to hold responsible, must have notice given to them, as is required to be given to the drawer in case of protest.—

The last rule is not to be understood as applying to a person not interested in the bill ~~to the full amount~~ to its full extent; for tho' a stranger may ~~be bound~~ become bound by his indorsement and liable to the indorsee, yet it will not render the note assignable.

It is said that ~~that~~ if the agent of the drawer shew his power of attorney to the payee or indorsee the latter must consent to his (the agents) acceptance of the bill.—

That a bill is good in the hands of an innocent holder, altho' it may intermediately have been acquired by fraud or even theft. see Burrow 482.—

When a bill by some unavoidable accident, as contrary winds, is detained until the time of payment is passed; the holder must nevertheless present it for acceptance and payment and get it protested if not accept-

Ld. Ray. 743.

3 Bac. 614

1 H. Bl. 98

Lex Merca.

=ed or paid and the parties shall be bound as in other cases.

If after acceptance the Drawee absconds, proof being made of it by the protest of a Notary: the drawer may be compelled to give better security—

Protest was not required to inland bills 1st Stat. 9 & 10 Wm. 3 Cap. 17. nor does the want of it since that stat. destroy the holder's remedy at Com. law to recover all but interest and costs — Protest is not necessary for a Note —

If the drawer pay a part of the bill it shall be allowed in favor of the acceptor. So if the drawer pay the whole, the acceptor is discharged —

Public Wrongs.

amounts to arson, yet only in the former is the punishment capital.*

Of Burglary.

Burglary is defined to be the breaking and entering a mansion house in the night season with an intent to commit felony. 1 Hawk 97.

In this definition there are 4 things to be considered 1st. The time 2d. The place. 3d. The manner 4 The intent.

1st. It must be in the night. Anciently the night was considered as commencing at Sun set and ending at Sun rise; but it is ~~not~~ now settled that if the act is committed when there is day light enough to see a man's face, it is no Burglary. This does not extend to Moon light; the rule there is this, that it must be so dark as to prevent a man from distinguishing or recognizing objects with certainty. 7 Co. 6. 34. Moor. 660. 1 Hawk 80. Cro. El. 583. 9 Co. 66.

2d. As to the place. The act to constitute Burglary must be committed in a Mansion house. Ld. Coke also adds that the breaking open a Church is Burglary for he views it as "Domus mansionalis dei". 1 Hawk. 162. 3.

The breaking of a house which is dwelt in best half of the year, amounts to Burglary, even tho' the offence be committed during the time the owner is absent.

Public Wrongs.

Mr Reeve thinks that breaking an out house within the ~~curtelledge~~ Curtelage amounts to Burglary.

But if a shop in which no person dwells is broken open, it is not burglary. It must therefore be a dwelling house 4 Co. 40. Keyling 24. 52. Popk. 42.

3dly. As to the manner of committing burglary - there must be both a breaking and an entering. By this must not be understood merely a legal breaking vi et armis but something more; for if a man's door or window is already opened to enter therein would be a mere trespass vi et armis. If however a door or window should be entered altho' not fastened it will be breaking - 1 Haw. 160.

The case of a man's descending a chimney is considered a breaking. Keyling 82. 62. Hutton 20. Eno. Lar. 65. 225.

So also to knock at a door and upon its being opened rush in with a felonious intent will be a breaking.

So also to procure admittance thro' the interference of a ~~m~~ constable, in order to search for Traitors, and then to bind the constables and rob the house.

As to what is an entry, it is considered that any half way partial entering will amount to it. As with any part of the body, or with an instrument or weapon held in the hand. So to step over the threshold, to

Public Wrongs.

to put a hand or hook into the window, to ~~dra~~ draw out goods or a pistol to demand money all burglarious entries Kegling 67. 1 Hawk 40.

Again a man who keeps watch for an other to enter is considered as having entered himself "nam qui facit per alium facit per se" Keylyng 111.

It will also be so, if one within confederates with one without, so as to get him in, it is an entry in both parties Stra. 881.

4th As to the intent — the breaking and entering must be with an intent to commit felony, for an entry without this it has been said would be meanly a trespass — But whether the intention be carried into execution or not, makes no difference, if such intention is demonstrated by some overt act — Show. 53. Stra. 481. 1 Haw. 164.

The stat. of Lon. has altered the Com. Law in this, that it must be to break a house ——————— where goods and wares are deposited ~~to make it~~ is burglary.

The punishment of this crime by the Eng. law is death, by Com. Law New gate.

Of Perjury.

The definition of perjury is the same as it was at Comm. Law

altho' the punishment has been raised by stat.

Perjury is "a wilful false swearing in a point material by a person under oath relative to some proceeding in a court of Justice — and the oath must be lawfully administered by some one authorized to do it. 1 Haw. 318.

1st The swearing must be wilful, for if it arises from inadvertancy, mistake, or surprise, tho it will not be considered perjury. If from taking a wi view of all the circumstances charity would suppose it not to have been wilful it will not be perjury. To constitute it, perjury there must be some thing more than a mere difference between the oath of the witnesses; for such difference may arise from a thousand extraneous circumstances differently understood — 5 Mod. 350. 10 Mod. 195. Salk. 512. 1 Haw. 319.

2d. It must be relative to some proceeding in a Court of Justice — By this it is sufficient that the court authorizes a swearing by commission or otherwise, and therefore the false swearing need not necessarily be in court — 1 Haw. 319.

But where in an arbitration one of the arbitrators is a competent officer as justice of the peace, and administers an oath to one who swears falsely, will this be perjury? Altho' the rule formerly was that it must be a court of record; yet Mr Bl thinks that as arbitrators are a kind of domestic courts there

Public Wrongs.

is the same danger of injury resulting from bad false swearing in them, as in other courts, even of record hence Mr Ro. infers it to be Perj.

It is settled that a man may commit perjury in Chan=cery.

Affidavits of a private nature relating alone to certain facts not in Court, if even so false will not constitute the crime of perjury. Altho' these extra judicial oaths are now quite common yet Mr Russe has always questioned the right of persons to administer them.

So no promissory oaths if false will constitute perjury 1 Haw. 319.

A breach of truth in an oath of office is not perjury. Or where a grand juror, or an attorney takes an oath to perform the office faithfully and do, not do it. The party however will be committing a misdemenor for which he may be called to account. Guilt will be in=curred "in foro conscientia" These cases cannot be pun=ished as perjury upon the ground of the proceeding not being in a court of justice. Co. Et. 166. 907. 185. 609. 1 Roll ab. 89. 2 Roll 257.

3dly. To constitute perjury the oath must be administered by lawful authority, A swearing false in an oath administered by one not authorized will never constitute perjury.

Public Wrongs.

4 Bl. 157, 1 Haw. 322. &c.

Will a false swearing under an oath administered by a court wanting jurisdiction (as evidenced by a reversal of judgment) in the cause in dispute, amount to perjury? It has been said (this being coram non judice, but an extra judicial proceeding) it will not amount to ~~pun~~ perjury. But Mr Reeve seeing that there is no doubt, but that the court has power to administer an oath, thinks it should be considered as Perjury. 1 Vent. 181.

When a party himself is a witness and swears falsely it will amount to perjury, as he may do when called upon in Chan.; so in the action of account, or to the absence of a witness at law.

4th. The swearing must not only be wilful but false. This does not intend false in fact alone, but falsly made; for the man may ~~swear~~ falsly ~~and~~ and still may be as he swears it to be. To constitute perjury he must swear wilfully false i.e. to something which he really does not believe himself. This will be the case very often when a man swears rash hazard to that which he knows nothing about. Palmer 292. 3 Mod. 222. 1 Haw. 322.

It has been said that it must be not only ~~wilfull~~ wilful and false but ~~so~~ absolute. That is, that he must swear positively and absolutely to a fact or facts. This would be a ready way to get rid of perjury, but it is now abrogated. Haw. contra.

Public Wrongs.

5.th It must be in a point material, which is an important ~~circumstance~~ consideration - How is this to be understood? If it is entirely immaterial ~~to all persons~~ to all purposes, most certainly it will not constitute the crime of Perjury, but where a witness enters ~~in to~~ into a circumstantial detail to give him credit as to a material point, these circumstances altho' in themselves immaterial, yet if false will constitute perjury - These circumstances were connected with a material point, and to give the witnesses credit as to that point. Cro. El. 500. Salk. 514. Lastt 422. Palm. 382. 1 Haw. 324.

When it is in part material it is by no means necessary that it should be sufficient to substantiate a recovery for the party for whom the witness swore. It is relevant testimony in the question, and not whether it goes the whole length towards establishing what it tends to. Ld. Ry. 258. 889.

If it is in part material, but so unimportant as to have no influence or make no odds, it is conceived that it will not be perjury -

Subornation of Perjury, is nothing more than the procuring a man to commit perjury, and the punishment of each is the same 1 Haw. 325 -

The punishment for perjury was originally death - Afterwards either banishment or cutting out the culprit's tongue - The punishment now at Com. Law is fine and imprisonment (at the discretion of the court) and an incapacity to be a witness in

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future, upon the ground of having committed the "crimen falsi"

The punishment by the Eng. is a fine not less than £40, and imprisonment not less than 6 months, or nailing both ears to the pillory — The court may also transport for 7 years — & a return before the expiration of the time is felony without benefit of clergy —

The Can. Stat. seems to be made in affirmance of the Com. Law.

It has been a question of moment, whether a party injured by false swearing to the amount ex-gra £500 could sue and recover his damages independent of the Stat.? Wm R. sees no reason why this may not be done —

Of Forgery.

Forgery at Com. Law will now be treated of, for what it is by the Eng. stat. does not at all concern these states — ~~states~~ — The statutes make rather additions to the Com. Law than alterations of it — At Com. Law the crime was narrower — Statutes have merely extended it.

Forgery may be defined to be "the fraudulently making or altering any matter of ~~a public nature~~ record, or any other authentic matter of a public nature or any deed or will" 1 Haw. 335 —

Any matter of record, refers to the records of courts &c &c —

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Any other authentic matter of a public nature refer to Parish registers, certificates of marriages, protections to come to come to court &c. - Haw. 338.

Deeds and Wills (which are of a private nature) include at Com. Law all instruments whatever duly executed under hand and seal.

The alteration of any inferior instrument is not forgery at Com. Law; altho' it would be a ~~misdemeanor~~ misdemeanor and punishable as such - Cro. El. 296. 1 Roll 66. 353 or Cro El. 353 -

If A. sells to B. black acre, and afterwards sells the same land to C. and ante date, the deed it will be forgery, altho' Sir Ed. Coke and others contend that it will not - for they say a man cannot forge his own deed - Bacon 655. 759. 1 Haw. 336.

So if a man ~~writes~~ writes a will for an other and inserts in it a legacy or legacies, not intended by the testator, it will amount to forgery -

So where a man finds a ~~name~~ name, above which he writes a conveyance, or other instrument - so that the name answers to it - it will be forgery - 3 Mod. 66. 4. Mod. 192.

It is necessary to keep in view that this alteration must be a fraudulent one to constitute forgery; for if no bad intention can be inferred nor no advantage to be gained by the person who alters, it will not be forgery - As

Where the obligee altered a bond from £500 to 500 marks

it was no forgery, for the obligee gained nothing thereby, and the alteration was made to correct an error, committed in writing a deed —

So where "beef cattle" was altered into "neat cattle" neat cattle having been intended by the parties —

If the person derives any benefit who alters — or does any one an injury — it will be ~~perjury~~ forgery. Moor 655 Salk. 375 —

It has been a question whether a man by mere nonfeasance, in omitting to insert what was directed and intended by a testator, in his will as a legacy, is guilty of forgery? It has been decided that a mere nonfeasance as to omit to insert a legacy is not forgery — But if such nonfeasance will make the will speak essentially different from the intention of the testator as to the quantity, nature, and time, of commencement of the estate given as where it makes it a distinct thing, or gives it a distinct operation, it will be forgery — 1 Hew. 337.

The stat. of Con. has extended forgery to an alteration of almost any instrument whatever where there is this fraudulent intention which is indispensibly necessary to constitute forgery.

It has extended it to an alteration in deeds, bonds, wills, testaments, acquittals, letters of attorney, bills, receipts, releases, or any other writing whatever; which means any writing in the real nature of any or either of the before mentioned writings —

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This clause undoubtedly includes any and every alteration made to prevent justice and equity.

Letters for "sport & fun" written and alterations made, will not constitute forgery, tho' the judge advises against them.

The Com. Law punishment for this crime is fine imprison=ment, and standing in the pillory at the discretion of the court. In Com. Newgate not exceeding 3 years.

Of Robbery.

Robbery now will now be treated of as contradistinguished from other kinds of Stealing.

Robbery is a felonious and violent taking away from the per=son of an other his goods or money of any value (and it is sometimes added) by putting him in fear. This latter is never laid in the indictment for robbery, and is never necessary to be proved because it is uniformaly presumed from the violence offered. Besides it would often be very difficult to prove that a man was in fear. To adopt this criterion would be to say that what would be robbery in a man of weak nerves, would not be so upon a man of of strong nerves. 1 Hawk: 147.

1st. It must be a felonious taking; i.e. such as one as would have subjected in Eng. the estate of the criminal to forfeiture

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2dly It must be a violent taking. Afforatt, violence very nearly applies to the actual taking. If there is any violence offered, by which the man is induced to deliver up his money &c, afterwards it will be robbery. 1 Haw. 147.

This crime when once committed can never be purged by a redelivery of the money under any circumstances whatever. As

Where a robber demanded a gentleman's money which he gave him in a curious purse which he expressed a great regret to part with — The robber gave him the purse to get out the money and in the mean while was apprehended — this was robbery — 1 Haw. 147.

The act of taking must be committed. If a robber goes even so far and does not get the property it will be no robbery — Not even tho' the robber apponted the person and cut his girdle. 1 Haw. 148.

Any person who consents himself in aiding or abetting a spriting is as much a robber as the person who perpetrated the act — As where a company were in search for John but not finding him, one of them falls in with Tom and robs him — all are equally guilty — 1 Haw. 148.

The taking must be from the person — It is however not necessary be all that the property be attached or in the actual corporal possession of the owner — It need not be the house he is

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In the first place Mr. Reeve will make some remarks and general observations as introductory to the different kinds of offences –

Crimes and Misdemeanors are the same altho' the latter generally denotes a lower offence –

Whenever an act is committed which is prohibited by law it will be a crime; that is it will be a civil crime, altho' it may not be a crime "in foro conscentia" –

To omit what is by law commanded to be done will also be a crime – This must be understood with some qualification, for if the thing forbiden to be done is merely a private wrong, it is not a crime, altho' may be recovered therefor, by the person who is injured – To be a crime it must be an injury to the public or to society. Yet however where Murder or Robbery &c are committed, they are not only public injuries but private injuries of the highest nature – It is presumed that when the above is understood with this qualification it may suffice as a a complete definition of a Crime – Vide 1 Haw. 1. 2. & Ble.

By the English law, private injuries are some times merged in the public wrong, and sometimes not – In cases of rape, assaults &c the private injuries are not merged; but in Burglary, Arson, Murder, the private injuries are said to be merged – Let us enquire the origin of this doctrine of Merger – In Eng. whenever

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a man committed — treason or felony his life was jeopardized and his property became the subject of forfeiture — Therefore to commence a civil action for the private injury would be nugatory — Hence the private injury was said to be merged or drowned Mr R. thinks this reason would not apply where the culprit might claim benefit of Clergy, or what is the same thing "a pardon" — One thing is clear that none of this reasoning founded on forfeiture, will apply in the U. States, and therefore action may be brought for the private injury — Ex gra — In case of Nuisance — Where a man runs a fence across a highway & an other falls over it and breaks his leg, a public prosecution and a private action may be commenced.

There is prevalent, a ~~distinction~~ division of offences into those "Mala in se" and "Mala prohibita". The true line of difference Mr Reeve presumes to be this, that an offence Malum in se is one which would have been such, before the existence of society — It would have existed anterior to the formation of laws &c and in a state of nature as some express it — As murder &c (Cain and Abel instanced) and these offences are not the more criminal because prohibited by human laws —

Laws "Mala prohibita" are mere positive regulations, as when men are commanded to bury their dead in woollen, or to make their cart wheels of such dimensions &c.

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But can a man be justified in breaking these laws provided he pays the penalty? Some eminent have maintained the affirmative, and their reasoning would apply, were our revenue to be created by penalties. But Mr Reeve thinks that there is a certain respect and obedience which we owe to the laws of our country which should bind us foro "in foro conscientiæ" never to transgress.

To constitute a crime it is said there must be both a Will and an Act, for where a man merely meditates the commission of a crime, it will certainly not amount to one, in the eye of the public. So where a man does an act unlawful, but does not intend to do it, it will be no crime. But where a man attempts to murder and does not commit the act yet it is a crime. The time was however when an attempt to murder, was considered as the actual commission of the crime.

1st. It seems that there must be a Will. Acts are committed where the will is said not to join and are therefore not public offences, but excusable.

First, where there is a defect or want of understanding.

Secondly, where there is understanding but no will as in all cases of mistake and accident, where the act is altogether involuntary.

Thirdly, where a man is excusable on the ground of being coerced or compelled by some superior force or power.

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1st As to a want of understanding — this does not include men of mere capacity, or simple men. There must be some radical defect. First in case of Infancy there is this want of understanding —

By the civil law the presumption was at first, that no one under 7 years old could have a discretion enough to commit a crime; this was afterwards extended to all under 10½ — Where persons are over 14 there shall be no inquiry on the ground of infancy — Between 7 & 14 the maxim applies "malitia supplet ætatem", for between these periods the inquiry is, was the perpetration "Capax doli"?

In Eng. one at 8 years of age has been ~~executed~~ executed for arson ~~and~~ and at 9 one for murder — Under 7 capacitat, punishment cannot be inflicted —

2d Idiots and Lunatics are incapable of committing crimes; the former on the ground of a want of understanding, the latter on the ground of no settled mode of thinking, or on account of derangement of thought —

3d Drunkenness by the Roman law exculpated the perpetrator of a crime their maxim being "qui delapsus in vino non cul=pabilis" — But our maxim is "omne crimen ebrietas et incendit et detegit" and therefore if one commits a crime when intoxicated it will not at all excuse him; and yet in case of drunkenness there is the same want of understanding that there is in case of Luna=cy or Idiotcy — The rule then is founded in policy, for if drunken

=ness excused a crime, men wishing to perpetrate crimes would only have to get drunk. It is clear then that it must either be no justi=fication or else drunkenness itself must be punished — Mr Ro. has heard a man of very accurate understanding advocate the latter which if adopted Mr R. conceives the advocate himself would have stood in danger [illegible]

2dly Where there is understanding but no Will as in case of mis=takes or accident — Where a man justifies on this ground, he must shew that he was pursuing some lawful employ==ment when the mistake or accident happened — Where a man aiming at a fox kills a man who was not seen, nor could have been found out by ordinary vigilance and due care — there will be no crime; but if a man shoots at his neighbours horse and kills a man, it will not be a justification to say he intended not to kill his neighbour — It is said that if the act intended to be committed was felony such kil=ling will be murder —

Ordinary and not more than ordinary care is requir=ed to be used — as where one is cutting with an ~~axe~~ axe and an other person standing by the axe flies off for the first time and kills the bystander, it will be no offence but if the axe had frequently flown off before and flying off kills the by=stander it will be an offence —

In the case of obeying an unrighteous, but legal offence covert the case of a treasonable

offence by unpolitic of manner -
to kill an innocent person to escape death, when
a peaceable may kill the assailant - which killing may
in any case be justified

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The doctrine of Deodands, or as Mr R. humorously observes "the punishing a cart" by the forfeiture of the wheels for running over one is now antiquated.

Again there are other classes of cases where the will is not concerned; and these are such acts as are committed from an ignorance of some fact. As where a man attempts to commit burglary and the owner of the house meaning to kill him supposes he sees him, and by mistake strikes and kills an other. This must be specifically a mistake and not merely an ignorance of the law for "ignorantia non excusat legem"

3d. In compulsion there is no exercise of the will. Under this head may be ranked that class of cases, where something is ~~committed~~ commanded by law to be done which "in foro conscientiæ" is wrong or wicked, or against a man's conscience; in such a case his omitting to do it will be justified.

No relationship however near will excuse the commission of a crime except where the wife is coerced by the husband, where the husband commands her, she will be excused in all cases except Murder Treason and all cases purely "malum in se" But where they are ~~mixed~~ mixed partly "malum in se." and partly "~~malum~~ mala prohibita", the wife will be excused. She will be excused in all cases merely "mala prohibita"

All acts committed by the compulsion of a superior physi-

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-cal force, will be justifiable, because the person is a mere instru-ment in the hands of the superior impelling power.

Of Principles and Accessories.

I. A principal offender is one who either absolutely perpetrates the crime or who is present at the time aiding or abetting the fact to be done. This "presence" is not always an actual standing by, within sight or hearing, but it may be a constructive presence as where one keeps watch, for an other while he commits Robbery Murder &c

II. An Accessory is one who does not perpetrate the fact himself, nor is present aiding and abetting it, but is either directly or indirectly in some way concerned therein, either before or after the crime committed.

As in many cases, the intention goes a great way in constituting the crime it will be necessary in this place to define the term "malice" and the definition about to be given will apply as well to civil as to criminal acts. If the incentive which induces a man to commit an act is a vile one, he is in all such cases said to act maliciously. But malice is better explained by a reference to the abstract Latin word "malitia" wil itself. To say a man acts "malo animo" will not even come completely

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up to the purport of the latin word. the act must proceed from an unsocial malicious heart an evil heart.

To determine the degree of malice exercised it is necessary to take into view all the circumstances, attending the commission of the act. Where a man strikes an other and kills him, it will be deemed murder: yet if the perpetrator had been induced to commit the horrid deed, from provoking words he it will be manslaughter only. This malice may be further evidenced by the case of a master chastising his servant or ~~child~~ a father his child. If the former in so doing kills the latter it might amount to manslaughter or any justifiable homicide according to the circumstances. the weapon and the manner in which it was used will be taken into consideration.

Again if a teamster should drive over and kill a child by accident entirely, it will be an act excusable; but if he should see a number of children in the street, and should drive over and kill a child in a careless and inattentive manner it would amount to ~~manslaughter~~ manslaughter.

Where the teamster see a child in the street, and order him out of the way, but the child not immediately obeying, he should run carelessly over him, and kill him, it will be murder. Here there is that "malitia" which our language fails of describing.

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Of Felony---

Many crimes are considered as felonious, and many not so. Felony by the Eng law, comprises every species of crime which occasions a forfeiture of lands and goods — We have fallen into the habit of calling felonious whatever is felony by the Eng. books, notwithstanding forfeiture does not at all prevail in this country—

In Eng. this crime was punished with death but not necessarily so, for the benefit of clergy was sometimes claimed and obtained —

Of Particular offences and first of Arson

Mr Rowe will take notice of this offence as it was at Com. Law. By the English statutes it has been considerably extended, tho' not by ours - 4 M. 220 - therefore the com. law of Eng. is our law as it relates to this offence. "Arson" then "is the malicious and wilful burning the house of an other" The word made use of in the register is "domus" which has given a rise to the question whether this term denotes particularly a Mansion house - 1 Hawk. 165 —

In power a man's own house may be a
Mechanic
Landlord barrier Lessee house etc total
Houses 115

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The burning out houses or barns, stables &c within the curtilage (as it is called) amounts to arson; for the out house are considered as a part of or belonging to the house itself. The common law has been so far extended as to make the burning of a single barn in the fields, arson if the barn has hay or grain in it. 4 Co. Rep. 20. 4 Bac 221. 1 Hawk. 166. 4 Bl. Com.

By stat. in Eng. the burning stacks of hay or grain in the fields, was made arson. Not so here.

1st. The rule says to constitute Arson "it must be the burning of house of an other person" Therefore if a man burns his own it will not of itself amount to Arson. But if a man sets fire to his with an intent to burn that only, and in so doing burns his neighbour's, it will be Arson, and the reason is that the act in the first place was unlawful and done "malo animo" 2 Co. Car. 377. 1 Hawk 166.

It has been determined in the English courts that if a lessee for years sets fire to a house on the leased premises it will not be arson for during the term the house is the tenant's property.

Upon the same principle, if a reversioner sets fire to a house which is to revert to him and of which an other is in possession under a lease for himself, it will be Arson. Mr. B. however thinks Eng. decisions inapplicable to our country should

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not be suffered to govern us

2 The rule says, the house must be burnt — Our next en=
=quiry is how much must it be burnt, to constitute this crime?
The least possible burning if it be done with a malicious intent,
says Wm. P. will amount to Arson; but if it be not done with
a malicious intent, it will be trespass only — 4 Bl. 221. 1 Haw. 167.

3d. The only remaining part of the definition to be con
=sidered is the manner in which the crime is to be commit
=ted — It must be a voluntary and malicious burning —
if therefore the house is set on fire by negligence or mis
=chance it would not be considered as Arson — Therefore also
where a man intended to set fire to B's house, but mistook &
burnt A's this will be arson for the malicious intent de
=termine it — Plowd. 475.

The stat. of Lon. declares that if any person 16 years of
age or more, shall wilfully or purposely burn any house, barn
or out house, he is guilty of arson —

The punishment of Arson at Com. Law is death without
benefit of Clergy —

By the stat. of Lon. if the life of any person is endan
=gered by the burning of the house the incendiary should
be punished with death tho' if there is no life endangered
the fact is otherwise; for altho' in both cases the crime ~~amounts~~ *

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himself on. If the man is put in fear and the taking is in his presence, it will be sufficient - Salk. 613. Carth. 145. 1 Haw. 148. 9.

The taking or delivery up must be in consequence of fear; for if a watch is taken privately out of a mans pocket and afterwards the taker ~~thutters~~ threatening, commands him not to stir ~~unless~~ un=til he escapes it will not be robbery; because the fear did not occa=sion the taking -

But the case of a robber begging alms with arms threatening if the person applied to do not bestow on him - This is robbery -

Fear, is in fact the grand criterion to judge of robbery - Foster ~~Crown~~. Law. 128.

So threatening ~~one~~ to swear a crime against one if he does not give so much money, will be robbery, if the money is given.

So where there is a claim of property and a threat if it is not delivered up, if it is given up thro' fear it will be robbery this is ~~growing~~ going a considerable length - Kayleg. 70.

Where a man comes up ~~and~~ in the street and ~~knocks~~ knocks off your hat, it will be no robbery because no fear was excited &c &c -

Robbery differs from Larceny in this - In no other Larceny shall there be judgment of death unless the thing stolen be above the value of 12 pence, but robbery shall have judgment how small soever the value may be of the thing taken away. 1 Haw. 149.

1 Haw. 146.

1 Haw. 134.
196.

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Of Theft or Larceny.

Theft is not an appropriate technical term, for it includes all the several kinds of Larceny.

Larceny is divided into Simple Larceny and Compound or Mixed Larceny.

Simple or single larceny is further divided into Grand and Petit larceny. If the theft is of 12d or under it will be petit larceny and not punishable with death.

Concerning this Blackstone makes an ingenious observation "that while every thing else has grown dearer man's life has grown cheaper."

The distinction between all these kinds of Larceny relates to the punishment and not to the ~~crime~~ nature of the crime, for that is the same in them all.

"Grand or Petit larceny is a felonious and fraudulent taking and carrying away, by any person, the personal goods of an other not from the person nor from his house"

1st It must be a felonious taking This is merely discriptive, and relates to such taking as would subject the goods of the taker to forfeiture.

2d It is a fraudulent taking. It must be such a taking

1 Haw. 134.

1 Haw. 135.
in a note

1 Haw. 135.

as includes in it a Trespass. If it is not with a bad or impure intention, it will not be fraudulent. And so nice have the determinations been, that if a man finds a watch "animo furandi" it will not be theft or larceny.

It is clearly settled that whenever an article is bailed or delivered to one for his benefit and at the time of taking he has no fraudulent or thievish intention, and afterwards goes off with it, it will not amount to theft, but if he takes it with an intention to steal, it will amount to theft. The bailment must be for some beneficial purpose to the Bailee.

To show the intention of the taker, all the circumstances must be taken into view, for if it was a bona fide bailment, it will not be theft, not being fraudulently obtained. Thus far we may speak with confidence.

But it is laid down that where there is a bailment, not for the benefit of the Bailee, but of the Bailor, such carrying off would not be theft; yet the current of authorities support a contrary doctrine.

There has been held a difference between a delivery of an article to a servant, and a delivery to a common carrier, for it is said if the servant runs away with the article it will be theft but if the common carrier it will be only a trespass.

Leacher's resp.
title Larceny.

1 Haw. 136.
4 Blac.
Keyling 24. 37.
43. 1 Roll 73.
7 Ray. 276.
Moor 246.
Popham 34. 1 Sid.
254 –

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So it is said where goods are delivered to a tailor, or grain to a miller and they convert them or carry them off it will not be be theft in either — and yet it is settled that if the tailor cabbages a part of the cloth or the miller takes a double share of Grist or Toll it will be theft — i.e. if the Carrier, or the Tailor, or the Miller takes a part only of what is delivered to him it will be theft, but if they take the whole it will not. These distinctions are certainly arbitrary, and the reason of them of them cannot be seen — The principle in fact is the same as appears from the following cases —

Where money or other property was delivered to a servant who carried it off it was theft —

So where one delivered guineas to bend another to get changed, and he runs off with them, it was theft —

So where a man committed stock to a shepherd who ~~tend~~ took them without licence, it was theft.

So where a man hired ~~t~~ a room and carried off the furniture it was theft &c &c.

Upon the whole Mr Reeve supposes that whenever there is a delivery or bailment to an other who takes the property with an intention to steal, and does actually carry it off it will be theft the exempt cases of the Carrier, the Tailor & the Miller notwithstanding —

1 Haw 136.

1 Haw. 141.

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As to Indictments— It has been settled that where A. steals from B. and C. steals from A. B. may indict C. as having stolen the property from him, without concerning with A. and he may be indicted in any county—

Strictly speaking however Indictments for offences are local. Where an offence is committed indictments must be not only in the same state but in the identical county where the crime is committed— To this rule the case of stealing or larceny forms an exception; for a thief may be indicted in any county, because he is supposed to steal from any and every county. If the person however is indicted for stealing in one county, he cannot be indicted (for stealing the same thing) in an other county—

Where a riot is ~~committed~~ commenced in one county and continued thro' several, the riots will be distinct in each county—

So a libel in one county it seems will subject the libeller in every county—

3d. It is not only a taking but a carrying away— Any the least moving, will be carrying away under this defini=tion— There must however be some emotion— Where a man was caught tying up the sheets belonging to the bed whereon he lay with a manifest intention to steal them, it was a car=

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carrying away.

So where a man was caught with a horse in the pasture but had not gotten him out. 1 Haw. 146.

So where a man was caught taking money out of a trunk it was a carrying a way of all that he had taken out.

So where a man was caught shearing wool off of a sheep's back but had not moved away with it. 141 of Haw.

But where a man had merely hoisted up a bale of goods it was not carrying away for there was no asportavit whatever.

When a man at a public entertainment had twicked a ring out of a ladies ear which lodged in her "ringlets" it was a sufficient asportation or "asportavit" 4 Bl. c. Kelyng 818.

4th This taking and carrying &c. may be by any person this part of the definition is rather too broad, for the wife may take the personal property of her husband and carry it off without being guilty of theft. 1 Haw. 141.

It is laid down that where a wife delivers the personal property of her husband to some third person who takes "animo furandi" it will be no theft. This Mr B. seems to question. 96.

It is said that in cases of extreme necessity a man will be excused from committing larceny; but this is

1 Hawk. 141.
4 Bl. com.
233. 1 Mod.
89. 1 Vent.
187. Stra.
1137.

1 Hawk. 142.
8 Co. 38.
4 Bl. 234.

7 Co. Rep. 18.
1 Hawk. 148.

not warranted by the Eng. law.

5th It must be the carrying away &c of the personal goods &c. — Theft cannot be committed by taking any thing whatever which adheres to the freehold (unless such ~~theft is~~ taking is made theft by stat.) as emblements growing on the land, apples growing on the trees &c it will be otherwise if the emblements are cut or the apples fallen ~~of~~ off the trees &c.

"It seems that it must take a <u>little time</u> for their real property to turn into personal" for if a man severs the property from the freehold at one time and carries it away at an other time it will be theft — These are artificial distinctions.

Choses in action are not that kind of personal property on which theft may be committed at Com. Law; because they are not considered of any use to anyone except the owner and not so much endangered to stealing therefore provision for such cases is unnecessary. 1 Haw. 142 — In Eng. and perhaps in some of these states they have made it theft by stat.

Bank bills are (it is supposed) subject to theft on the ground of their passing currently as money.

Theft cannot be committed on mere creatures of whim and fancy; as cats and dogs monkies &c. If any thing which is really beneficial to the owner be taken it will be theft.

principle shewing for the person deposing aged of benefit of swearing either of sides

1 Haw 144 or 164.

Cro. El. 586.
1 Haw. 145.

1 Haw. 152.
4 Bl. 71. 72.
2 Wood. Lect. 421.

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When a man has a right of fishing in a particular part of a river, lake, or pond, and fish are caught out of that part it is not theft. But if a man takes fish and puts them into a trunk or makes a pond and puts them in and they are taken from thence it will be theft.

But a man may steal his own goods as where he delivers them to a tailor or other person for a particular purpose and in order to subject the Bailee steals away the goods, it will be theft.

As to Mixed Larceny - which is the taking from the house or person of another it is the same as other larcenies. It is only an aggravated species of larceny, in which the thief is deprived of the benefit of Clergy. In simple larcenies the benefit of Clergy is extended i.e. the culprit is screened from being hanged the first time.

Of Piracy.

Every species of depredation or robbery on the sea that amounts to felony in any of the before mentioned cases on land will be piracy unless it be done by any of the inmates or crew of the vessel in which such depredation is committed.

It matters not whether it be done openly or privately by ~~violan~~ violence or merely by fraud. If any of the crew or inmates steal or commit depredations in their vessel, they will be prosecuted

22 Hen. 8.
c. 14

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These offences are all there remedied to preserve peace and tranquillity in society.

Of Homicide.

Of Homicide there are several distinct classes.

I. Justifiable which frequently happens from accident and to which there is no blame attached.

II. Excusable Homicide which is devided into that "per infortunium" where there is not ordinary care, and se defendendo, in self defence where there was an intention to kill but excusable on the ground of self defence. In both of these there is some blame attached — as the case may be.

III. The next grade of Homicide is where the crime is not so great as to amount to Murder nor so small as to be excusable and which is called Manslaughter.

IV. Where a man's life is taken with a malicious and wicked heart and is denominated Murder.

I Of Just.ble Homicide.

And first of homicide which happens per infortunium or by accident. In order that a death should happen

I.

II.

III.

V.

by accident and therefore to be justifiable the one who perpetrates the act must not only be doing a lawful act but must take proper i.e. ordinary care — As where a man in a barn had been pitching off a load of hay and a child silently gets under it, and is killed by ~~it~~ a stroke of the pitch fork — no blame —

So also where a man's axe flies off and kills another standing by, which had not been in the habit of flying off — there no blame attaches itself to the person —

If the act was ~~unlat~~ unlawful of which death was the consequence, the perpetrator is guilty of some offence — concerning this the rule Eng. rule is — if the person who kills another was doing some act which amounted to felt felony, the crime would be murder, but if he was doing an act under felt felony and death was the consequence, it would be manslaughter only — As committing a trespass &c this rule Mr. Rowe thinks unsound and a departure from principle — It should be recollected that to constitute murder there must be an unsocial malicious heart — there must be that ma=lice animinus, which we hear so much about. If then there are any cases, notwithstanding the act may be felonious, where this unsocial heart cannot be discovered Mr. Rowe presumes they cannot properly be called murder —

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As where a man is shooting hares for the purpose of stealing them and so kills another man it will be murder, but where he shoots them merely to plague his neighbor and kills him Mr Reeve thinks that this evil heart cannot be discovered. What! shall a man be cut off from society when he has not that unsocial heart which agreed on all hands is so essential & necessary to constitute the crime of murder – It is supposed that in such cases the crime should be manslaughter.

If death should be a consequence of any lawful sports or accreations as wrestling &c the crime would be ranked under the head of excusable homicide, unless there was some want of ordinary care or some impropriety in which case it would be Manslaughter. As where a game is instituted. ex-gra pitching a Cobbs which is unlawful in any of these cases should death insue, it will be manslaughter –

Where one man attacks an other with a large wedgel premeditatedly, not for the purpose of killing him but beating him, in fact to do him some great bodily harm, and actually kills him will it be Manslaughter or Murder? The solution of this question depends upon whether there was this malus animus, that unsocial heart. In this case there was says Mr R. & the authorities.

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Supposing a man having a spite at a company should attempt to do great bodily harm as by throwing large stones into the company and one is killed thereby it will be murder, for notwithstanding there might be no intention to kill yet there was that malitia inferable from so rude and savage an act—

But where death insues from a careless or incautious act, it will not be murder but manslaughter— As where ~~the~~ a man is ~~go~~ going to set down and the chair is pulled from under him for the purpose of creating a laugh, and death is occationed thereby it will be manslaughter as says Mr R. "the devil was not in the man in that case and yet it was an unlawful act"—

If death is the consequence of some unlawful act, and there is not the malus animus, it cannot amount to more than manslaughter but if the malitia is discoverable, it will clearly be murder—

Again A. aims a blow at B. with a design to kill him, or do him a great bodily injury but misses B. and kills C. this will be murder for the mescriad heart is discoverable—

But if this blow had been given under some sudden provocation from B. would have been manslaughter only

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It must be recollected that to make a killing accidental the act which occationed it must be done in a proper and lawful way. Every schoolmaster has a right to correct his scholars reasonably and in a proper way so a parent his child &c. But suppose a schoolmaster corrects a child from a proper cause with a proper weapon and in a proper manner and by an unlucky stroke kills the child it will be no more than accidental death and therefore ~~justifiable~~ excusable. But suppose he takes too large a whip but not so large as to be likely to kill and corrects the child so as to kill him it will be manslaughter. Suppose the man calls the child up and takes the iron ~~tongues~~ tongs or some other enormous weapon & strikes him so ~~he dies~~ that he dies it will be murder. Because the use of such a weapon discovers the malitia.

To exemplify this farther: A man is at work on the roof of a house throwing of tiles or bricks &c. Now if he gives proper warning to all below and throws and kills it will be justifiable. Suppose from carelessness or inattention he throws and kills without having given this warning, it will be manslaughter. But suppose he does this knowing that people continually pass below as in a city, the malice aforesaid is inferable, and of course

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it would be murder.

Again a man driving a team thro' this street and intently and accidentally a child runs in the way and is crushed it is justifiable, but if the child is in the road and the dri=ver being careless runs over him and crushes him it will be manstaughter. If he sees the child and tells him to get away and he does not do it and the teamster drives on and kills him, it will be murder. Mr Reeve wishes us to recollect that the least negligence or carelessness about an act from which death issues will subject the perpetra=tor to manstaughter.

Again where in company a squib is thrown not large enough to occation an apprehension of death but death issues, this will be manstaughter, but if the squib was large and of course dangerous and death issues this will be ~~manstaughter~~ murder.

So where a mad bull is intentionally turned into a company and he kills some one it will be murder in him who turned him out.

Where a man was shooting over the heads of oth=ers to frighten them, and some one strikes the gun down so as to kill it will be manstaughter

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Foster puts a case where a man found a pistol with a rod in it which went entirely down when the attempt was made with it to see if the pistol was loaded – and of course created a suspicion that the it was not loaded, it happened however that the rod was too short and in snapping killed his wife is it manslaughter or justifi=able homicide? This depends upon whether the man was careless. If there was any thing less than ordinary care it will be manslaughter if there was not it will be justifiable Homicide – Foster seems to be of the latter opinion –

Where a man unloaded his gun lest some mischief should ensue, and some one without his knowledge loaded it and put it in the place where it was first put, and he in showing his wife how exact it would strike fire shot her dead. Foster deems this justifiable –

2dly. Another kind of justifiable arises from unavoida=ble necessity and is founded in justice – As the executing a man under sentence of death – Ld. Coke says where the warrant of exn varied from the judgment of the court and execution according to the warrant it would be murder in the executioner but this is contrary to every dictate of common reason and Mr Kenn ~~seems~~

4 M.c.

deems it to be no more than justifiable homicide — Where the officer substitutes one punishment for an other it will be at most but manslaughter —

3d Homicide is justifiable 1 In case of resistance to an officer who has legal authority and 2 where a man attempts to commit an atrocious crime to prevent which homicide is committed.

I. This must be an actual forcible resistance, for if the officer has once gotten the person in his power and then kills him it will be murder —

Where the man who flees or attempts to escape from the officer, is accused of felony and is killd by the officer it will be justifiable, but if he is accused of trespass only or any crime or injury lower than felony and is killed, some contend that it would be justifiable others that it would be manslaughter —

Where an officer trips up a man's heels to catch him and death is consequent thereon, Foster deems it justifiable It seems that cases of this kind depend upon this whether the act has a tendency to kill, yea or nay.

II. Of Excusable Homicide — Judge Blackstone divides excusable homicide into 1 Per infortunium or misadventure and 2d into se defendendo resting

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upon the principle of self defence and preservation. Of the former of these Mr K. seems to have fully treated under the foregoing head, probably more for the sake of giving a whole view of this subject than from any idea of regular arrangement — The latter kind or Se defendendo will now be treated of of which there are two kinds —

1st Where the person assaulted may kill without retreating at all and plead se defendendo —

2nd Where the party assaulted must retreat or far as he can without being in the most eminent danger which when it is the case he may give the fatal blow and excuse it on the ground of se defendendo —

I. As to the first. A man need not retreat at all when an other attempts to rob him but may kill him immediately and be excused — So where a man attempts to break into another's house in the ~~nite~~ night time — So where an attempt is made to burn an other's house So where a man attempts a rape —

II. Where a retreat is ~~necessary~~ necessary before killing to enable the party to shield himself by this se defendendo or inevitable necessity —

There are cases where attempts are made exclusively upon the person and not upon the property or in the other

4 Bl. 184.

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case. They are cases too of sudden affrays where life is taken by a man when toped by "Brevis furor" or shortlived passion or rage.

One who thus happens to be engaged in a sudden affray must not take the life of his opponent without retreating until his own life is endangered it is not material in these case which party begins the affray.

This Homicide se defendendo differs from man slaughter in this; when in the same affray both parties are actually combatting at the time when the mortal stroke is given the slayer is then guilty of manslaughter But if the slayer hath not begun to fight or having begun indeavors to decline any further struggle and off afterwards being closely pursued by his antagonist, kills him to avoid his own distruction, this is homicide excusable by self defence. I repeat it that it is not material who begins the affray.

But if one man apaults another knowing him to be passionate and (understanding fencing well) retreats for the purpose of killing the opponent and actually does kill him in this way it will be murder for this discovers the malus animus.

Homicide se defendendo is frequently called

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Chance Medly.

The punishment for this offence at Com. Law was a forfeiture of goods and chattels (hence denominated felony) but now there is no punishment annexed to it.

Of Manslaughter.

Manslaughter is of two kinds one of which has been necessarily considered in going thro' the preceding cases as where a death is occasioned by the commission of some lawful act thro' carelessness and inattention.

And so likewise where a death is occasioned by doing a lawful act in an incautious ~~mood~~ heedless manner, tho' with no design to injure.

The second species will now be considered which is known by the name of <u>wilful manslaughter</u>.

This is when one intends to kill an other or to do him great bodily harm and actually executes his intention, this will always be murder unless it be shown that it was done in a sudden affray, in the heat of blood & with some actual or conceived provocation, & if this be shown it will amount to nothing more than <u>wilful manslaughter</u>. For the law considering the quickness of temper or a humane intermitting is willing

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to throw a veil over it in some measure tho' it by no means views it as the offence as blameless or wholly pardonable.

But if there has been ever so great a provocation and the party injured has time to cool before he exercises his wrath it has been always considered as murder, and their is a rule of policy as well as justice, for if it was not viewed as murder it would be virtually giving encouragement to revenge.

Again - where a man without any provocation throws himself into a passion and kills another his passion will not excuse him, for it is a mere diabolical fury without cause and it would be murder.

The ~~same in the case as to slander~~ case would be the same as ~~appl~~ applied to slander for if one man is provoked to speak ill of an other it will go in mitigation of damages.

But if a man without cause throws himself into a passion and then defames another it will be an aggravation of the offence and consequently of the damages.

It now remains to determine what degree of provocation will reduce the crime of killing down from murder to manslaughter.

No words nor gestures or any other actions ex=

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=premise of contempt will be sufficient.

But suppose in consequence of these provocations a person should take up a horse whip evidently with a view to chastise him merely but in so doing he should unfor=tunately kill the man it would amount to manslaughter only.

But if this person under the same circumstances had made use of an improper weapon as an hand spike it would have been murder for here the malice aumer appears.

A case put in the books which was determined to be murder — A boy was caught stealing wood from a park by a parker who in stead of chastising the boy with proper punishment tied him to his horse's tail and then went to whipping the horse which ran off and killed the child and this was ~~held~~ held to be murder.

Two boys got a fighting the smallest of the two was considerably injured he went home and told his father who ~~we~~ went immediately in pursuit of the boy and followed him nearly three quarters of a mile with a cudgel and upon coming up with him he struck and killed him this

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this was considered to be manslaughter. But the Revs. consider it to be murder for two reasons. 1st there was not sufficient provocation to make use of such a weapon, & 2d there was time for his blood to cool before he came up with him. The above case is said by some of the reporters to have been wrongly stated for they say the father took a small stick which make a material difference in the case.

Where A caught B. in the act of adultery with his wife and put him to death ~~immediately~~ immediately it was held to be manslaughter. Otherwise if he had waited till his temper had cooled and then killed B.

A man killed in a deliberate duel is considered as being murdered. and yet many duels are fought without either of the parties acting malo animo. It is policy however to consider every duel as murder where death is the consequence.

The Con. stat. upon manslaughter has taken the last species only viz. that of voluntary or wilful manslaughter & has left the others as at Com. Law punishable by fine and imprisonment.

In any trial for murder the Jury may find the criminal not guilty of murder and at the same time bring in a verdict of Manslaughter.

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Out of this general kind of verdict a great question has grown viz. How are the court to know which species of manslaughter the criminal is convicted of; whether it be the incautious heedless manslaughter or whether it be willful – The court at the time may have heard the evidence but they are not judges of the fact therefore cannot ascertain this point, but are merely to pronounce judgment on the facts or verdict when found but they have notwithstanding their incapacity been accustomed in the practice of furnishing such general matter by stat. But the House Courts never noticed the propriety of so doing; but on the contrary where a man is found guilty of manslaughter generally, without designating the kind he thinks the court ought to punish as at Common Law.

We have a stat. likewise preventing bastard women who have bastard children from putting them to death in order to conceal their shame. The Legislature have made it criminal to conceal the death of such infants. ~~if the child is born alive~~

Murder will now be noticed in a distinct branch from any before mentioned by treating an OFFICER in the EXECUTION of his DUTY –

No passion excited by an officer executing his duty which may prevail upon an individual to resist and thereby kill

This is not necessary except in the private persons
of
being authorized to execute the duties of an
officer —

[illegible] the accused to be brought
before [illegible] and by [illegible] examined and
to be taken down not obliged to answer
any question which will be evidence of his
guilt and which he is drawn out of him
by promises or threats not admissable in
he relates a fact which afterwards may afford
evidence the case where the goods stolen were
found — when may be discharged i.e. — he must
be committed or give bail to appear & bond when
bailable an offence 2d 1st — crimes bailable
of 100 & under the magistrate is fixed — bond
by whom taken — one bail on final process — forming
all ~~offences~~ felony bailable murder expelled by an
act of statute 2d 1st and then lessen afterward
manslaughter — a denial of persons after being
committed — persons taken in mainour stolen
property who cannot give a reason for possession
suspicion be felony left to discretion of jurors
court of B.R. may bail for any offence under
statute particular — if not fixed committed by
warrant containing the crime

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the officer will reduce the crime from murder down to man=
=slaughter —

And the crime will be the same when extended to all the officer's associates and even to private individuals where there services are necessary — For if any of these individ=uals are slain in assisting the officer, by a resistance of the criminal altho' it be upon a sudden affray still it will be murder or under the stat. of Hue & Cry where every person is obliged to turn out if called upon by the officer —

But in these cases where an officer is doing his duty the resister must have notice of his being an officer — (a)

The warrant must be a legal one for if a man resists an officer with an illegal warrant and kills him it would be no murder but man slaughter.

You are not to understand that the warrant must be legal in every respect, for if it apparently so on the face of it, it is sufficient —

If a set of individuals purpose and take a wrong person and he kills some of them it will be ~~all~~ manslaughter otherwise if an officer ~~is~~ purposes with a warrant and takes a wrong person and gets killed for this is murder.

If a gaoler by mal treatment suffers a prisoner to

1st levying war, not only and attempt to destroy
and subvert the new form of Government but of stop
down to compel what they call reforms - to compel
the government and to remove our men from office
to enact certain laws even an unknown law
to pull down all Court houses &c but a private
bank &c - a conspiracy to levy war is not treason
why is it held to be treason in England

2d adhering to the enemies of the government
sending intelligence, provisions, arms - by land
to newly secured very or going over to the enemy
Enemies are subjects of foreign powers with whom we
are at war - to assist pirates, robbers &c. so to
assist rebels - relieving a rebel fleet - confirmed
its effects - of the resolution of the government
except behaving 2d Wheat 12 Tonks 270
blasphemy what - charging his laws condemnation
reproachfully profane swearing at the Sacrament
Wheaton of Gold & 2d - of religious worship

Public Wrongs

die he will be guilty of murder—

Petit treason may happen in three ways by stat. Ed. 3d By a servant killing his master a wife her husband or an ecclesiastical person his superior.

Treason—

As relating to our form of government— 1st If a number should convene for the purpose of constraining the administration to alter the measures or to repeal certain laws or to remove public officers he it would be treason without any attempt by the people to remove what they call grievances by force is treason—

But a mere conspiracy against the government without an actual attempt to execute their designs is no treason but a high misdemeanor—

2d— Where a number get together and pull down meeting houses of a certain religious sect it is treason—

3d In any manner joining with rebels— is treason but where a man is compelled by them thus to do the case is different— Aliens if they are under the protection of the laws may commit treason as well as natural born ~~subjects~~ subjects—

two witnesses of arrest, having a warrant &c

arrest apprehending a person to answer to sus-
pected crime 1st by warrant 2d by an officer
without Warrant 3 by private person without
Warrant - magistrate appointed to whom warrants
the business of Justice - to be brought to examine and
the prisoner handed over to officer or private per-
son to arrest & bring no general warrant is admis-
sible nothing is left to any judgement of the officer
officer bound to execute as far as the prisoner may
jurisdiction - justice may arrest without ~~officer~~
~~to bring the prisoner~~ sheriff arrests without warrant
a constable may without Warrant for breach
of peace in his presence in case of felony or
highly on probable may break open doors
without Warrant and of bailed & by negligence
it is murder - private persons peaceably retain
felons is committed bound to arrest and may
break doors - upon suspicion may arrest -
but not break doors of his dwelling house &c

of poverty

1st presentment without – The attorney swears an information 2 indictment a complaint is exhibited to the grand jury who altho the court then consider swearing must be precedent the grand jury considers the complaint presented bottom – they hear evidence only on the part of the public – the witnesses examined to the county wounded in one county and then in another etc

3rd recommitment by 5 last ed bills of Lavency

4th Habeas Corp – indorse the bill – defendant no cognizable for failure of evidence no argument

5th trial in not agreed find the bill particular

6th trial words nevertheless – on Lavency the value must be proved therefore – in home

7th the wounding with which charge the wounds

before witness for penalties – on the merits of

the Lavency – on upon application same in

good person because upon prosecution

plea unlawful against murder for same offence

which amount found guilty of manslaughter

or pardon – if found against him. Habeas is not

guilty for on that plea only the one can be judge

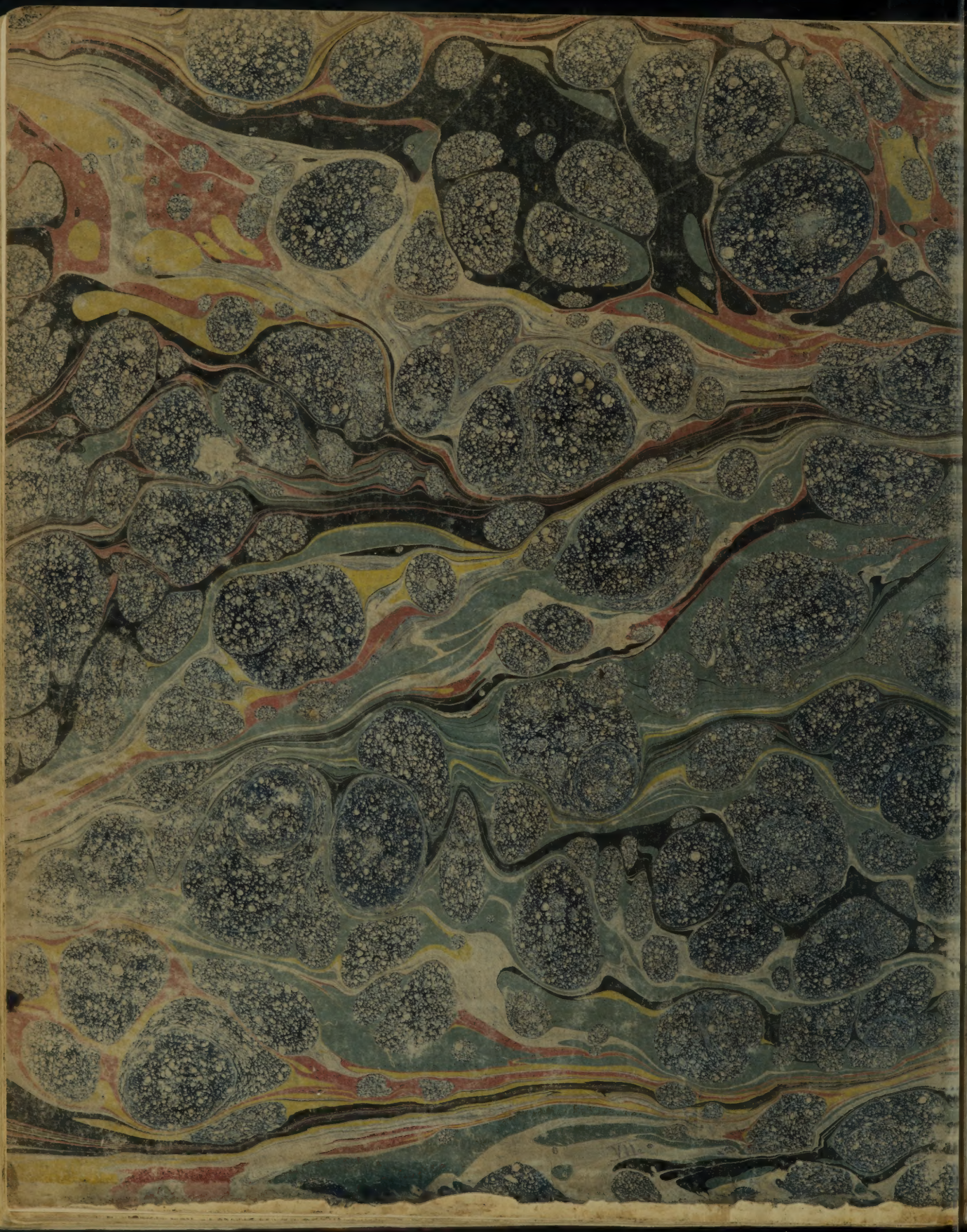
ment of death. Appeal. wounding was – no

pardon. not granted when related offence

person committed as in a quarrel action commenced

case of murder or poisoning imprisonment

merely. the effect of a pardon



REEVE'S
LECTURES

VII